

Transcript
C-LL Moore *267*
TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 75 *C*

JOHN D. FLANAGAN, PETITIONER,

vs.

FEDERAL COAL COMPANY

**ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF THE STATE
OF TEXAS**

PETITION FOR HABEAS CORPUS FILED MAY 22, 1925

HABEAS CORPUS GRANTED NOVEMBER 22, 1925

(20,000)

26
Texas vs. A.D. 264

with Dallas & Henderson 257



(29,653)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 346

JOHN D. FLANAGAN, PETITIONER,

vs.

FEDERAL COAL COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT
OF TENNESSEE

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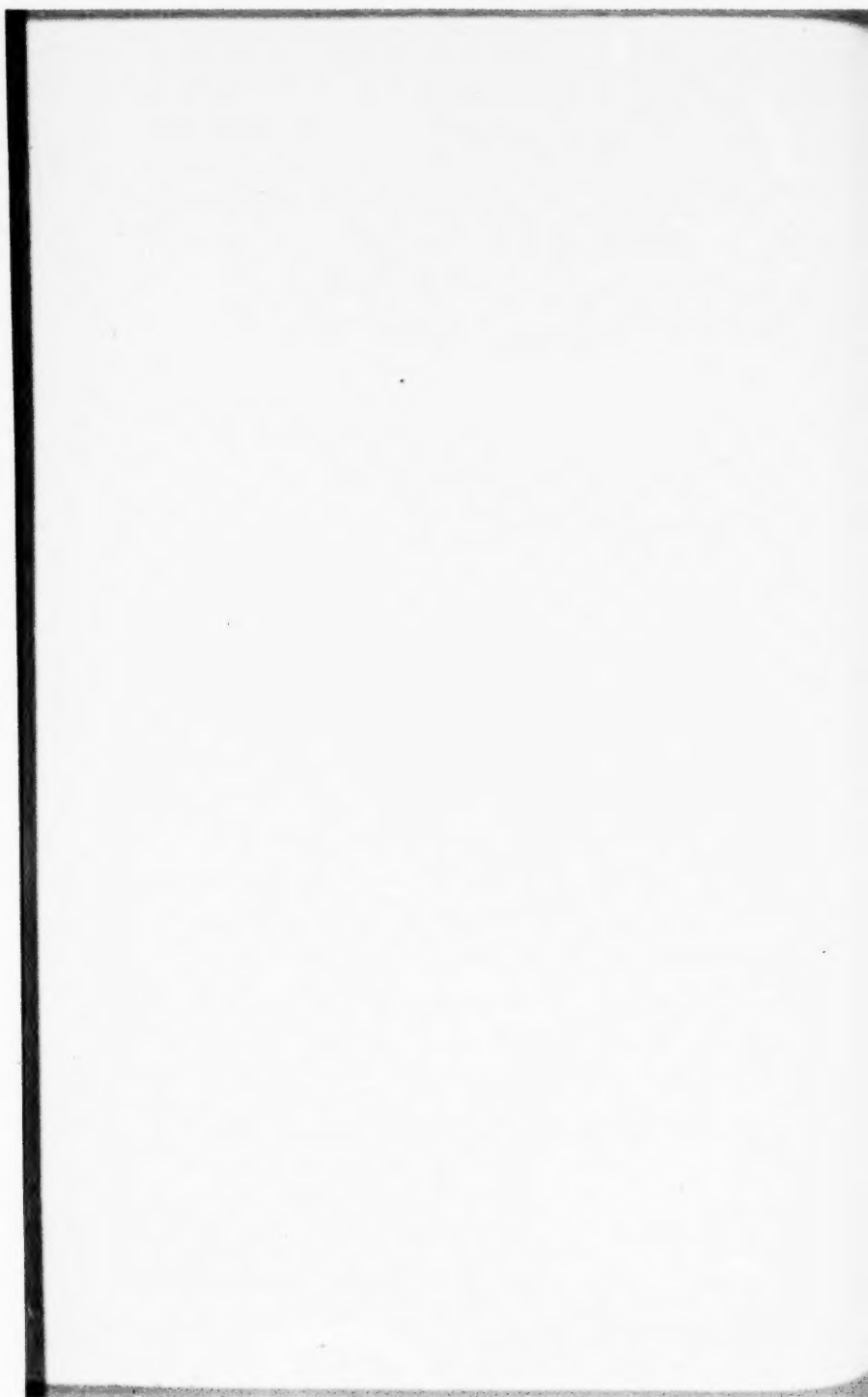
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[fol. 1] At a regular term of the Chancery Court of Hamilton County, Tennessee, begun and held at the Court House in the City of Chattanooga, said State and County, on the first Monday, it being the 5th day of June, 1922, present and presiding the Hon. W. B. Garvin, Chancellor in and for the Third Chancery Division of the said State, the following proceedings were had, viz:

Style of Suit

No. 18888

Consolidated Causes

FEDERAL COAL COMPANY

vs.

W. S. BATES et al.

17813

JOHN D. FLANAGAN

vs.

FEDERAL COAL Co.

Prosecution Bond

We are Complainant's security for costs of the foregoing bill.
Moore & Lynch.

Original bill filed August 24, 1921. No. 18888.

[fol. 2] To the Honorable W. B. Garvin, Chancellor, Holding Chancery Court at Chattanooga, Tennessee.

Bill of Complaint of

FEDERAL COAL COMPANY, a Corporation of Chattanooga, Tennessee,

vs.

W. S. BATES, a Resident of Hamilton County, Tennessee, and The Tracy City Coal Company, a Corporation with Its Situs at Tracy City, in Grundy County, Tennessee, Defendants.

BILL OF COMPLAINT

Complainant respectfully shows unto the Court that on April 7, 1920 it entered into a contract with defendant, W. S. Bates, as follows:

Federal Coal Company, Inc.

Chattanooga, Tenn.

This Contract, made this 7th day of April, 1920, by and between the Federal Coal Company, with general offices at Chattanooga, Tennessee, of the first part, and the Chattanooga Coal Company of Chattanooga, Tennessee, of the second part.

Witnesseth: That party of the second part has entered into contract with the Tracy City Coal Company, T. O. Busbee, Acting Agent, of Chattanooga, Tennessee, for 18,000 tons of coal. It is understood that party of the second part entered into this contract for benefit of the party of the first part.

Party of the first part hereby agrees to purchase this coal from party of the second part at \$4.10 per ton f. o. b. cars, mines and hereby assumes to second party all obligations which second party assumed in contract with the Tracy City Coal Company. Party of the second part hereby sells the coal covered by contract in question to party of the first part and hereby agrees that all rights, privileges and benefits which he might receive under the contract with the Tracy City Coal Company he will transfer to and use for benefit of party of the first part.

The purpose of this contract is to transfer from the Chattanooga Coal Company to the Federal Coal Company all of the rights, privileges and liabilities which the Chattanooga Coal Company may have under its contract with the Tracy City Coal Company for a consideration of 20 cents per ton on the coal shipped by the Tracy City Coal Company under the contract.

In Witness Whereof, Both parties have signed in duplicate.
[fol. 3] (Signed) Federal Coal Co., First Party, By E. R. Thompson, Secretary. Chattanooga Coal Co., Second Party, By W. S. Bates."

The foregoing contract gave to this complainant all the rights and benefits contracted for by W. S. Bates in his said contract with the Tracy City Coal Company therein referred to. The said contract bound the Tracy City Coal Company to ship and deliver, f. o. b. cars at its mines at or near Tracy City, Tennessee, 18,000 tons of coal at the rate of 8 cars per week during the year beginning April 12, 1920, and expiring April 12, 1921, at the price of \$3.90 per net ton of 2,000#, according to railroad rates. The quality of said coal was to be Tracy City straight run of mine. The 8 cars per week provided for in said contract was to be the usual railroad car used in the shipment of coal from Tracy City mines, which in that field averaged 45 tons per car, which at the rate of 8 cars per week for a year would be approximately 18,000 tons. A copy of said contract is herewith filed as exhibit 1 to this bill.

Upon the execution of the contract between W. S. Bates and this complainant, the said Tracy City Coal Company was advised of the fact that all of the coal contracted to be delivered by it had been sold to this complainant, and was due to be shipped and delivered to this

complainant, and the said Tracy City Coal Company recognized the right of this complainant to take and have the benefits of its said contract entered into in the name of the Chattanooga Coal Company, and to receive the said 18,000 tons of coal contracted to be delivered by it and is now estopped to deny that it is liable to this complainant on account of its breach of said contract. Said Tracy City Coal Company shipped and delivered to this complainant 712.20 tons of coal during the first two months of said contract. During the week from April 15 to April 21, 1920, the defendants failed to ship and deliver 301.20 tons of coal contracted to be shipped and delivered [fol. 4] livered by them; the market price of the said coal during said week was \$4.40 per ton. Hence this complainant suffered damages on account of failure of the said defendants to ship and deliver said coal, in the amount of \$90.36.

During the week April 22-28, 1920, the defendants failed to ship and deliver 83.85 tons of coal contracted to be delivered by them during this week; the market price of said coal was \$4.40 per ton; hence complainant suffered damages to the amount of \$25.15.

During the week of April 29—May 4, 1920, said defendants failed to ship and deliver 165.85 tons of coal due to be shipped and delivered by them during said week under their said contract; during this week the market price of said coal was \$7.00 per ton. Hence this complainant suffered damages because of their said failure to ship and deliver the coal contracted to be shipped and delivered in the amount of \$480.64.

During the week of May 5-11, 1920, said defendants failed to ship and deliver 260.40 tons of the coal required to be shipped and delivered by them under said contract. During said week the market price of the said coal was \$7.00 per ton; hence this complainant suffered damages to the amount of \$755.16, because of the failure of the said defendants to ship and deliver the tonnage of coal required to be shipped and delivered by said contracts.

During the week of May 12-18, 1920, said defendants failed to ship and deliver 360 tons of coal required to be shipped and delivered by them under said contract. During said week the market price of said coal was \$7.00 per ton, hence this complainant suffered damages to the amount of \$1,044.00 because of the failure of said defendants to ship and deliver the tonnage of coal required to be shipped and delivered by them under their said contract.

[fol. 5] During the week of May 19-25, 1920, the said defendants failed to ship and deliver 321.40 tons of coal required to be shipped by the said contract during said week. The market price of said coal was \$7.00 per ton, hence this complainant suffered damages to the amount of \$932.06 because of the failure of the said defendants to ship and deliver the amount of coal required to be shipped and delivered during said week by their contract.

During the week May 26-31, 1920, defendants failed to ship and deliver 315.10 tons of coal required to be shipped and delivered by it under their said contract. The market price of said coal during said week was \$7.00 per ton, hence this complainant suffered damages to the amount of \$913.79 because of the failure of the said

defendants to ship and deliver the said tonnage of coal required to be shipped by the said contract.

During the period June 1-29, 1920, said defendants failed to ship and deliver 1440 tons of coal required to be shipped by their said contract. During said period the market price of coal was \$8.50 per ton. Hence this complainant suffered damages to the amount of \$6,336.00 because of the failure of said defendants to ship and deliver the tonnage of coal required under the provisions of their said contract.

During the period from June 30, to July 27, 1920, the said defendants failed to ship and deliver 1440 tons of coal required to be shipped and delivered by their said contract during said period. The market price of said coal during said period was \$9.50 per ton. Hence, this complainant suffered damages to the amount of \$7,776.00 because of the failure of the defendants to ship and deliver the tonnage of coal required by their said contract.

During the period of July 27 to August 31, 1920, said defendants failed to ship and deliver 1,800 tons of coal required to be shipped and delivered during said period by their said contract. The market price of said coal during said period was \$10.50 per ton; hence this complainant suffered damages to the amount of \$7,056.00 because [fol. 6] of failure of said defendants to ship and deliver the coal in accordance with the obligations of their contract.

During the period from September 28 to October 26, 1920, said defendants failed to ship and deliver another 1440 tons of coal required to be shipped and delivered by them under the terms of their said contract. During this period the market price of said coal was \$7.75 per ton. hence this complainant suffered damages to the amount of \$5,256.00 because of the failure of said defendants to ship and deliver the amount of coal according to the provisions of their said contracts.

During the period from October 26, to November 30, 1920, said defendants failed to ship and deliver 1,800 tons of coal required to be shipped and delivered by them during this period under the terms of their said contract. During this time coal was \$6.50 per ton, hence this complainant suffered damages to the amount of \$4,320.00 because of the failure of said defendants to ship and deliver the amount of coal according to the provisions of their said contracts.

The foregoing several amounts make a total of \$46,205.16 for which defendants, Tracy City Coal Company and W. S. Bates, are jointly and severally liable unto this complainant as damage for their breach of contracts, and failure to deliver the coal required to be delivered by the provisions of their said contracts. Complainant charges that it is entitled to maintain this bill against the said parties for the amount of its said damage, and the costs of this cause.

Premises considered complainant prays that process issue and be served upon said defendants, that they be required to answer this bill, but not under oath, the oath to their answers being waived. On the hearing grant complainant a decree against the said de

[fol. 7] fendants for its said damage of \$16,205.16, and the costs of this cause.

Grant general relief.

Moore & Lynch, Solicitors for Complainant.

[fol. 8] EXHIBIT #1 TO BILL OF COMPLAINT

The Standard Coal Selling Contract Between

Seller: Tracy City Coal Company, T. O. Busbee, Acting Agent Corporation.

Address: Chattanooga, Tennessee.

Buyer: Chattanooga Coal Company, Chattanooga, Tennessee.

Description and Quality.—Tracy City straight run of mine coal.

Price.—Price to be \$3.90 per net ton of 2,000# f. o. b. cars at mines.

Terms, Weights.—Railroad weights are to govern all settlements.

Character of Car Equipment Deliveries.—Coal to be shipped in coal cars only. Place of delivery is to be on board cars at the mines. Coal to be shipped during the period beginning on 12th day of April, 1920, and ending on the 12th day of April, 1921, at rate of eight (8) cars per week, a total tonnage of 18,000 tones. (Approximately.)

Payment.—Remittance to be made semi-monthly, in full for previous two weeks' shipments.

Default in Payment or Acceptance.—In the event the buyer defaults or fails to comply with the terms of this agreement, or any of them to make payments for coal shipped as and when such payments become due, or refuses to receive coal as specified herein, the seller, without notice, may at its option suspend shipments hereunder or cancel this agreement without being liable for any claims or damages of any nature whatsoever, and failure to exercise such option in any instance shall not be construed as waiving the right thereafter.

Impaired Credit.—If the credit of the buyer shall, at any time, in the judgment of the seller become impaired, the seller may, as it may elect, and without incurring any liability therefor, either require payment in advance before making any further shipment or cancel the unfilled portion of the contract without notice.

Strikes, etc.—Seller will not be responsible for delivery hereunder if prevented by strikes or combination of miners or laborers, accidents in mines or otherwise, fire or flooding, interruption of transportation, failure of car supply special or general, or from any cause beyond seller's control. In such case the obligation of the seller to deliver coal hereunder is limited and qualified to such extent as deliveries shall be prevented thereby, and no liability shall be incurred by the seller for any damages resulting therefrom. Buyers will not be required to receive shipments under this contract if through accidents, strikes or other causes beyond their control their

works are prevented from operating and notice thereof is given the seller previous to shipment from the mines.

[fol. 9] Car Shortage.—In case there should be a shortage of suitable cars at the mines from which seller proposes to ship under this contract, shipments will be apportioned equitably and uniformly on all contracts or orders so far as the same can be accomplished.

Agreement; No Outside Understanding.—The seller hereby agrees to sell and ship, and the buyer hereby agrees to buy, receive and pay for, the coal on the terms and conditions herein set out.

The entire contract between the parties is stated above, and there is not outside condition, warranty or understanding.

Witness the signatures of the respective parties hereto.

(Signed) Tracy City Coal Co., Seller, (Signed) By T. O. Busbee, Acting Agent. Chattanooga Coal Company, Buyer. W. S. Bates. C. M. Preston, Security. Witness: (Signed) A. L. Butler.

Approved by Tracy City Coal Company, By President.

[fol. 10] IN THE CHANCERY COURT OF HAMILTON COUNTY

ANSWER OF TRACY CITY COAL COMPANY—Filed August 29, 1921

The separate answer of the Tracy City Coal Company to the bill filed by the Federal Coal Company against it and W. S. Bates on the 25th day of August, 1921.

Answering so much of said bill as it deems material respondent says:

It admits the execution of the contract set out in the face of the bill dated the 7th day of April, 1920. Respondent would further show the Court that John D. Flanagan was on the 19th day of August 1920, the General Manager of the respondent Tracy City Coal Company and a large stock holder in same, and at this time J. C. Beasley was the President of the said respondent. On that day, at the request of the officers of the Federal Coal Company, a contract was entered into between the said Flanagan and the said Federal Coal Company, under which the said Flanagan contracted to sell and deliver to the said Federal Coal Company two-hundred carloads of coal at \$9.00 per ton. At this time the market value of the coal provided for in said contract was at least \$10.00 per ton, and in order to induce the said Flanagan to enter into said contract for the sale and delivery of said coal at \$9.00 per ton, the said Federal Coal Company, through its officers and managers, agreed to cancel and did cancel the contract sued on in this case.

The said Federal Coal Company demanded a personal guaranty from the said Flanagan that he would carry out said contract, which guaranty was signed by the said J. C. Beasley, the president of the respondent Tracy City Coal Company. The said Beasley and Flana-

again were both directors in the Tracy City Coal Company and were and are the owners of the majority of its stock. From that time [fol. 11] the said Federal Coal Company treated the contract sued on in this case as a nullity. It has never asked for any coal to be shipped under said contract. On the contrary it has entirely abandoned same and has asserted no rights under the same until the bringing of this suit. It is advised that the said Federal Coal Company is estopped to assert any right under the contract sued on in this case under the facts as herein set out as against this respondent. The price of coal and the conditions of the trade have so changed that it would be grossly inequitable to permit the complainant to assert any rights under said contract.

Respondent denies that complainant is entitled to recover the sum set out in the bill or any other sum. It denies that complainant is entitled to any relief whatever against it.

As stated, the complainant Federal Coal Company abandoned this contract and during the balance of the life of the contract never asserted any right under it or ordered out any coal under it and never pretended that it was in force. In point of fact, during the last four or five months of the contract, coal was selling at a much lower price than that provided for in the contract. The complainant never pretended that this contract was in force after the 19th day of August 1920, until the filing of the original bill in this cause and until that day the respondent had no sort of notice that complainant was treating the contract as in force or desired its terms complied with. In point of fact, respondent could today ship the complainant the coal called for in this contract at a large profit.

Respondent denies all other allegations in the bill not herein expressly admitted, denied or explained, and prays to be hence dismissed.

Allison, Lynch & Phillips, and C. H. Garner, Sols. for Deft.
Tracy City Coal Co., By John D. Flanagan, Pr.

[fol. 12] IN THE CHANCERY COURT OF HAMILTON COUNTY

ANSWER OF W. S. BATES—Filed September 17, 1921

Respondent W. S. Bates, answering so much and such parts of the bill filed against him and the Tracy City Coal Company on August 24th, 1921 as he is advised it is necessary or material for him to answer, says:

That he admits the execution of the contract between him and the Federal Coal Company, as set out on the first page of the original bill and admits that by the execution of said contract he transferred to said Federal Coal Company all his rights and interest in said contract made by him with the Tracy City Coal Company, except his interest of 20¢ per ton, which was to be paid him on the 18,000 tons of coal set out and mentioned in said contract.

Respondent admits that upon the execution of the contract between

he and the complainant that the said Tracy City Coal Company was advised of the fact that he had transferred his interest in said contract to the complainant herein and admits that the said Tracy City Coal Company knew that this respondent retained an interest of 20¢ a ton for all coal shipped or to be shipped under said contract.

Respondent further admits that upon the execution of said contract the said Tracy City Coal Company began shipments thereunder and shipped some seven or eight hundred tons of coal and admits that the said Federal Coal Company paid to respondent his commission of 20¢ per ton on 785.60 tons, but he is not advised and does not know how much coal was shipped to said Federal Coal Company under said contract.

In regard to the prices of coal at different times and as the damage accruing to complainant by virtue of the Tracy City Coal Company [fol. 13] refusing to ship coal under said contract, this respondent is not advised and does not know and, therefore, in regard to all such allegations in said bill he does not answer and does not know the facts therein alleged and makes no denial or admissions thereof.

This respondent denies that he is liable to said complainant in any amount whatever, by virtue of the execution of either of the contracts or by virtue of the breach of said contract by his co-respondent, the Tracy City Coal Company, but answering said bill says that this respondent carried out each and every contract he made, both with the complainant herein and the Tracy City Coal Company and did all and everything that he was required to do under and by virtue of either contract and denies that he is indebted to either the Federal Coal Company or the Tracy City Coal Company in any amount whatever, but on the other hand the complainant and the Tracy City Coal Company and both of them is indebted to this respondent in the sum of 20¢ per ton on all coal covered by the contract with respondent and Tracy City Coal Company, except, as before stated, 785.60 tons, for which he received payment.

And now having fully answered this respondent prays to be hence dismissed.

W. S. Bates, By T. W. Stanfield, Atty. T. W. Stanfield, Sol.
for Bates.

No. 18888

FEDERAL COAL COMPANY

vs.

W. S. BATES et al.

DECREE ALLOWING AMENDED BILL—Enrolled April 4, 1922

[fol. 14] In this cause on application complainant is allowed to file its supplemental and amended bill upon giving bond for cost.

[fol. 15] IN THE CHANCERY COURT OF HAMILTON COUNTY

SUPPLEMENTAL AND AMENDED BILL—Filed April 4, 1922

To the Honorable W. B. Garvin, Chancellor:

In this cause comes the Federal Coal Company, and by leave of the Court presents this supplemental and amended bill and charges:

I

Heretofore on August 24, 1921 the original bill in this cause was filed by the Federal Coal Company against the Tracy City Coal Company and W. S. Bates, setting out a contract entered into between the Federal Coal Company and W. S. Bates, doing business under the trade name of Chattanooga Coal Company. The said contract so entered into and set out at length in the original bill was based upon the contract previously entered into nominally between Chattanooga Coal Company of which W. S. Bates was proprietor, and the Tracy City Coal Company, copy of which contract is made exhibit 1 to the original bill.

As shown in the original bill this contract was flagrantly breached by the failure and refusal to ship and deliver the coal contracted to be shipped and delivered under said contract, and your complainants suffered damages as set out in the original bill. As charged in the original bill your complainants frequently demanded the coal contracted to be shipped, and delivered under the contract exhibit 1 to the original bill, and many times requested and urged John D. Flannigan to ship and deliver the same. At that time John D. Flannigan was the Vice President and General Manager of the Tracy City Coal Company, who was represented to your complainants to be the seller of the coal contracted to be sold and delivered under said contract exhibit 1. Said Flannigan offered some pretext of car shortage, etc, at first as an excuse for not shipping the coal as rapidly as the contract provided, but as the market continued to advance and on or about May 28, 1920, shipments were stopped altogether. Up to that time only the small amount stated in the original bill had been shipped and thereafter your complainant was unable to secure any further shipments under said contract, but the same was breached flagrantly and without excuse.

II

Your complainant would now show it has lately learned that said contract exhibit 1 to the original bill was made primarily for the benefit of John D. Flannigan who was operating the mines of the Tracy City Coal Company as lessee and selling the coal on his own account and responsibility, under a mining lease by which the Tracy City Coal Company had let unto said Flannigan its coal property and mining equipment for the year 1920 for a royalty consideration upon the coal mined, of 35¢ per ton, based on a selling price of \$2.90 per ton with an increase or decrease of royalty in proportion as the

selling price of coal increased or decreased above or below \$2.90 per ton. The mining lease obligated the said Flannigan to operate the mines and sell coal sufficient to yield a stipulated minimum royalty, but primarily said John D. Flannigan was in control of the operation of the mines and the sale of the coal produced at the mines. Generally the coal produced at these mines was sold by said Flannigan in his own name, or in various trade names adopted by him for the purpose, but in this instance for some reason the contract was made in the name of the Tracy City Coal Company, the corporation of which John D. Flannigan was at the time Vice President and General Manager, and in which he owned stock. However, as stated, the primary duty and obligation to ship and deliver the coal under said contract rested upon John D. Flannigan as between himself and the Tracy City Coal Company. However your complainant believed [fol. 17] when contract exhibit 1 was made and when the coal was shipped thereunder, and continuously up to Saturday April 1, 1922, the obligation to ship and deliver this coal as contracted in contract exhibit 1, rested upon the Tracy City Coal Company alone. On April 1, 1922 by cross examination of John D. Flannigan as a witness in his own behalf, in cause No. 18713, on the Rule docket of this court, complainant for the first time learned the facts and at once applied for leave to file this amended bill. Your complainant would now show that John D. Flannigan is jointly liable with the Tracy City Coal Company for the breach of said contract exhibit 1, to the original bill, and liable to respond in full damages on account of such breach as set out in the original bill.

III

Complainant further shows that subsequent to the breach of the contract, exhibit 1, and during all of the time that your complainant was trying to induce John D. Flannigan as General Manager of the Tracy City Coal Company to make shipment of the coal contracted to be shipped under said contract, exhibit 1 to the original bill, that the said Flannigan, who was at the time handling and shipping a large amount of coal both as miner and as broker, disclaimed any individual responsibility for the fulfillment of said contract and represented that the duty and obligation for the fulfillment of the same rested upon the Tracy City Coal Company alone, which was unable to fill the said contract and that it could not respond in damages. Finally, about August 19, 1920, said Flannigan agreed with the Federal Coal Company to ship 200 cars of the coal, which in fact he was obligated to ship under said contract, exhibit 1, on condition that he was paid \$9 per ton for the same and that the previous contract, exhibit 1, to the bill, was cancelled and released. It is this agreement of August 19, 1920 which the Tracy City Coal Company is pleading as a defense to the original bill in this cause.

Your complainant says that said agreement of August 19, 1920 so [fol. 18] entered into by and between John D. Flannigan and the Federal Coal Company, was and is without consideration, fraudulent,

lent and void, because the said Flannigan at the time was obligated by the said contract, exhibit 1 to the original bill, to ship the coal which he therein contracted to ship, and the Federal Coal Company by the making of the said contract secured no more than another promise from John D. Flannigan to ship the same coal that he was already obligated to ship and deliver under the contract, exhibit 1 to the original bill. Complainant charges that said contract was procured by fraud by the said John D. Flannigan in that he fraudulently concealed the fact that he was already obligated to ship and deliver the coal which he was therein contracting to ship and deliver, and misrepresented the facts in this respect, representing that he was not so obligated but that the obligation rested alone upon the Tracy City Coal Company. He further misrepresented the facts with respect to the ability of the Tracy City Coal Company to perform its contract and to respond in damages for a breach thereof. Complainant says that these fraudulent concealments of fact and fraudulent misrepresentations of fact on the part of the said Flannigan induced the execution of the said contract by the Federal Coal Company and renders said contract void for fraud.

IV

The premises considered complainant prays that his be filed as a supplemental and amended bill in the above styled cause, that process issue and be served upon John D. Flannigan, a resident of Grundy County, Tennessee, and that he be required to answer hereto but not under oath, the oath to this answer being waived.

On the hearing grant your complainant a decree against W. S. Bates, the Tracy City Coal Company and John D. Flannigan, jointly, for its damages suffered by reason of the breach of the contract made exhibit 1 to the original bill. Grant general relief.

Chas. C. Moore, Solicitor for Complainant.

I am complainant's surety for the costs of this amended bill.

Chas. C. Moore.

[fol. 19]

[Title omitted]

In this cause, on application, complainant is allowed to file its supplemental and amended bill upon giving bond for cost.

[fol. 20] IN THE CHANCERY COURT OF HAMILTON COUNTY

ANSWER OF TRACY CITY COAL COMPANY—Filed April 18, 1922

Comes the Tracy City Coal Company and gives notice that it will rely upon the motion to require the complainant to elect, and answering the amended bill, says:

It denies that the cancellation of the contract sued upon was pro-

cured by fraud, misrepresentation or concealment or in any other manner improper.

It denies that complainant is entitled to any relief either under its amended or original bill.

As a matter of fact this contract was canceled by Federal Coal Co., whose officers well knew that it had acquired no rights under this contract because same was not assignable. It procured the assignment of the contract to it, well knowing that neither the Tracy City Coal Company nor its agent, T. O. Busbee, would deal with the Federal Coal Company and it procured the so-called assignment of the contract through fraud and does not come into the court with clean hands. Another reason to induce the cancellation of the contract was that the officers of the complainant found that it had been doing business in Tennessee without paying the tax required by law and this question had been raised against it in the courts, and they did not believe at that time they could enforce the contract, for this reason as well as for the reason just mentioned.

Respondent therefore denies that complainant is entitled to any relief against it and prays that the cross-bill be released.

C. H. Garner, Allison, Lynch & Phillips, Attys.

[fol. 21] IN THE CHANCERY COURT OF HAMILTON COUNTY

ANSWER OF JOHN D. FLANAGAN—Filed April 18, 1922

Comes John D. Flanagan and gives notice that he will rely upon the motion to require the complainant to elect, and relying upon said motion, answering says:

That it is not true that the contract sued upon was made in his behalf.

That it is not true that the cancellation of said contract was secured by this defendant through fraud, misrepresentation or in any manner set out in the amended bill. This entire charge is without the slightest foundation.

As a matter of fact, this contract was canceled by the Federal Coal Company, whose officers well knew that it had acquired no rights under this contract because same was not assignable. It procured the assignment of this contract to it, well knowing that neither the Tracy City Coal Company nor its agent, T. O. Busbee would deal with the Federal Coal Company and it procured the so-called assignment of the contract through fraud and does not come into the court with clean hands. Another reason to induce the cancellation of the contract was that the officers of the complainant found that it had been doing business in Tennessee without paying the tax required by law and this question had been raised against them in the courts, and they did not believe at that time they could enforce said contract, for this reason as well as the reason just mentioned.

Respondent denies that complainant is entitled to any relief against him and having fully answered, prays that cross bill be dismissed as to him.

C. H. Garner, Allison, Lynch & Phillips, Attys. for Flanagan.

[fol. 22] IN THE CHANCERY COURT OF HAMILTON COUNTY

PETITION OF FEDERAL COAL COMPANY—Filed April 24, 1922

To the Honorable W. B. Garvin, Chancellor:

Your petitioner, the Federal Coal Company, respectfully shows that the above styled cause is brought by it to recover damages for breach of a contract entered into about April 12, 1920 between Tracy City Coal Company and Chattanooga Coal Company, by which the Tracy City Coal Company sold to the Chattanooga Coal Company 18,000 tons of coal for delivery during the current year after that date. The Chattanooga Coal Company at that time was a partnership of which W. S. Bates was the principal owner and since that time W. S. Bates has become the sole owner of the partnership business.

The said contract was negotiated by the Chattanooga Coal Company under an arrangement by which the coal was to be taken by this petitioner, and immediately following the execution of said contract this petitioner entered into a contract with the Chattanooga Coal Company whereby it contracted to take the coal and pay to the Chattanooga Coal Company an advance price of 20¢ per ton, taking an assignment of all of the rights of the Chattanooga Coal Company in said contract.

Since that time W. S. Bates, as proprietor of the Chattanooga Coal Company has brought suit against this petitioner in this court and recovered a judgment, on the theory that he was acting as the agent of this petitioner in the negotiations of said contract.

In this suit it is material to your petitioner to prove that the Tracy City Coal Company and John D. Flanagan breached the contract for the delivery of said coal, and to that end, to prove that the purchaser and your petitioner were ready and willing to take the [fol. 23] said coal and sought to obtain the same. In actual practice under said contract the coal was shipped and billed by the Tracy City Coal Company to the Chattanooga Coal Company, and the Chattanooga Coal Company acted as the purchaser of said coal and was active in endeavoring to induce the Tracy City Coal Company to make shipments.

In the preparation of this case, and on March 7, 1922, your petitioner took the deposition of W. S. Bates, as proprietor of the Chattanooga Coal Company, in order to show by him that he, acting as purchaser of said coal and at the instance of this petitioner, frequently sought, both by correspondence and telephone messages, to induce the Tracy City Coal Company to ship the coal. In the course

of this examination said W. S. Bates, as a witness, testified that he had written numerous letters to the Tracy City Coal Company at the instance of this petitioner, of which he kept copies. Said W. S. Bates was represented by his personal counsel at the taking of said testimony, and when asked to file the letters and correspondence he objected to doing so until after consultation with counsel, and his counsel, Mr. T. W. Stanfield, present, reserved the not found such checks. However, your petitioner believes that said Bates has not made a good faith effort to find such checks, and that the same being in his possession as admitted by him, he could, if any good faith effort were made, find produce and file such checks.

Your petitioner charges that it is entitled to the benefit of this evidence in support of its case, and that the said Bates should be required to file both the correspondence and the cancelled checks mentioned.

He has failed to file either checks or correspondence, and has failed to file any explanation or reasons why such checks and correspondence [fol. 24] once are not produced.

Your petitioner now shows that this case has been assigned for trial on Monday, April 24th under an arrangement by which proof was permitted to be taken up to the time of the trial. Your petitioner has waited until this time in the hope that said Bates would produce and file said letters and correspondence, but now believes and charges that said Bates is withholding the same and will not file the same, and that your petitioner cannot have the benefit of said evidence on the trial except by an instant rule upon said Bates, requiring him to produce and file the same as exhibits to his testimony in this cause.

Wherefore, petitioner prays that a rule instant be made on W. S. Bates, a resident of Chattanooga, Hamilton County, Tennessee, and that he be forthwith required to produce and file all correspondence had with the Tracy City Coal Company in his own name or in the name of his trade name, the Chattanooga Coal Company, relative to the shipment and delivery of coal under a contract of April 12, 1920, or relative to the performance of said contract in any respect, all as asked for in said deposition. And, further, that he produce and file cancelled checks given by him to the Tracy City Coal Company in payment for invoices of coal delivered under said contract.

Grant general relief.

Chas. C. Moore, Solicitor for Petitioner.

STATE OF TENNESSEE,
Hamilton County:

Charles C. Moore makes oath that he is solicitor for the Federal Coal Company, petitioner in the above petition, and that the statements therein made are true to the best of his knowledge, information and belief.

[fol. 25]

Chas. C. Moore.

Sworn to and subscribed before me on this the 22nd day of April 1922. Sam Erwin, Clerk & Master.

IN CHANCERY COURT OF HAMILTON COUNTY

MOTION FOR ORDER TO ELECT DEFENDANTS—Filed April 28, 1922

Comes the Tracy City Coal Company and John D. Flanagan, and moves the Court to require the complainant, Federal Coal Company, to elect which of these defendants it will proceed against in this case, as these defendants are advised that the complainant cannot consistently ask for judgment against both of them.

C. H. Garner, Allison, Lynch & Phillips, Attys.

IN CHANCERY COURT OF HAMILTON COUNTY

No. 18888

[Title omitted]

ELECTION OF TRACY CITY COAL CO. AS DEFENDANT

This cause was heard on the motion entered by John D. Flanagan and the Tracy City Coal Company to require the Federal Coal Company to elect whether it would proceed in this cause against John D. Flanagan as the undisclosed principal in the contract sued on, or whether it would proceed against the Tracy City Coal Company as the agent in the making of said contract, which motion was sustained, and the Federal Coal Company is required to elect.

Thereupon the Federal Coal Company, in open court, by its counsel, elects to proceed and claim judgment for the breach of said contract, against the Tracy City Coal Company as the nominal [fol. 26] maker in said contract, in lieu of John D. Flanagan as the undisclosed principal in said contract.

IN CHANCERY COURT OF HAMILTON COUNTY

No. 18888

[Title omitted]

DECREE REQUIRING BATES TO FILE CORRESPONDENCE & CHECKS—
Enrolled May 5, '22

In this cause the Court having heard the petition of the Federal Coal Company to require W. S. Bates to file as exhibit to his testimony taken in the case, correspondence had with the Tracy City Coal Company, with reference to the contract in suit, and the delivery of the coal thereunder, and to file checks given to the Tracy City Coal Company in payment for coal delivered, and upon the

reply of W. S. Bates, by his counsel made to such petition in open court, and from consideration of the correspondence submitted, the court is of the opinion that the prayers of the petition should be granted.

Accordingly, W. S. Bates is required to file said correspondence, which being produced will be filed as exhibit to his testimony as called for. He is also required to file the checks called for, or to show cause by affidavit why same are not filed.

IN CHANCERY COURT OF HAMILTON COUNTY

No. 18888

FEDERAL COAL COMPANY

vs.

TRACY CITY COAL COMPANY

and

No. 18713

JOHN D. FLANAGAN

vs.

FEDERAL COAL CO.

FINAL DECREE ENROLLED—June 5, 1922

[fol. 27] These causes consolidated by agreement of parties, came on for hearing before the Honorable W. B. Garvin, Chancellor, on the pleadings and the proof, the entire record in the cause, as to all of which the Court filed its written memorandum opinion in the cause on June 1, 1922, which opinion is hereby referred to and made a part of the record of the cause.

In accordance with the said opinion, the original and supplemental bills of the Federal Coal Company vs. The Tracy City Coal Company et al., #18888, and the cross bill of the Federal Coal Company vs. John D. Flanagan, filed in #18713, are dismissed, and the original bill of John D. Flanagan vs. Federal Coal Company in #18713 is also dismissed.

The costs of all depositions in the consolidated causes is equally divided between John D. Flanagan and the Federal Coal Company and execution is awarded against each of them and the sureties on their cost bonds, respectively, for one-half of the costs of all depositions in the consolidated causes.

The costs of the original bill and all other costs in cause #18888 of Federal Coal Company vs. Tracy City Coal Company et al. is adjudged against The Federal Coal Company and Moore & Lynch,

surety on its cost bond for which execution may issue. All costs other than the depositions in the case of John D. Flanagan vs. Federal Coal Company #18713, is adjudged against John D. Flanagan and Allison, Lynch & Phillips, surety on his cost bond, for which execution may issue.

On the trial of these causes the depositions of E. R. Thompson and John Chrosniak, taken by John D. Flanagan, complainant, were not offered by Flanagan, but were offered and read by the Federal Coal Company. Also, the depositions of Mrs. Luther Talley and [fol. 28] Miss Winifred Smith, taken by the Federal Coal Company, were not offered by it, but were offered and read by John D. Flanagan. There was also read stipulation of counsel as to the testimony of E. R. Thompson and T. B. Roddy, and J. C. Beasley, as to certain matters, with check stubs exhibited thereto.

To all of the foregoing decree dismissing its original and supplemental bill against the Tracy City Coal Company, in cause #18888, and to all that part of the foregoing decree dismissing its cross bill against John D. Flanagan in cause #18713, the Federal Coal Company excepts and prays an appeal to the next term of the Supreme Court at Nashville, Tennessee, which to it is granted upon the execution of proper appeal bond.

To all of the foregoing decree dismissing his original bill against the Federal Coal Company in cause #18713, John D. Flanagan excepts and prays an appeal to the next term of the Supreme Court at Nashville, Tennessee, which to him is granted upon the execution of proper appeal bond.

By consent thirty (30) days is allowed from the entry of this decree to each of the parties to perfect the appeals herein prayed and granted by the execution of proper appeal bonds.

[fol. 29] IN CHANCERY COURT OF HAMILTON COUNTY

MEMO. OPINION OF CHANCELLOR—Filed June 2, 1922

To review the evidence and the law relating to all of the many interesting questions presented by the record in these cases and make appropriate response to the various contentions of counsel would require more time than I have at my disposal. I have to content myself with a statement of my conclusions without undertaking to set forth in any detail the process of reasoning by which the conclusions were reached.

There are some questions common to both cases which may be disposed of first, viz:

I

As to the assignability of the contract entered into in April 1920, between the Chattanooga Coal Company and the Tracy City Coal Company, which I shall hereafter refer to as the Bates contract.

Since this contract provided for the giving of credit to the Chattanooga Coal Co., it could not be assigned to the Federal Coal Company, so as to give the latter company the right to demand that the coal be delivered to it and the credit provided for in the contract be extended to it. But this was not attempted to be done under the contract of April 7, 1920, between Bates and the Federal Coal [fol. 30] Company. All the coal that was delivered was delivered by the Tracy City Coal Co. to the Chattanooga Coal Company, upon the credit of the Chattanooga Coal Company, and was paid for by the Chattanooga Coal Company, and there was never any demand that it be delivered otherwise; indeed Bates and the Federal Coal Co. considered it necessary or at least, on account of the supposed hostility of the agent Busby to the Federal Coal Company, they considered it expedient, to keep secret from the Tracy City Coal Company, the fact of the assignment. The coal, as it was shipped to the Chattanooga Coal Company, was turned over to the Federal Coal Company, and was invoiced to it at the contract price of \$3.90 plus the agreed compensation of 20 cents per ton, which was paid by the Federal Coal Company. The Federal Coal Co. thus supplied to the Chattanooga Coal Company the funds with which the Chattanooga Coal Company paid the Tracy City Coal Company for the coal. But this was no concern of the Tracy City Coal Company. By the arrangement between Bates and the Federal Coal Company these parties did not affect, and did not assume to affect, the legal rights of the Tracy City Coal Company, in any way. The arrangement, had it been fully disclosed to the Tracy City Coal Co. and Flanagan at the outset, would have afforded them no legal ground for repudiating the contract, and did not afford them such ground when they later learned about it.

When the Tracy City Coal Company and Flanagan subsequently breached the contract by failing to deliver the coal, the right of action for the damages which thereupon arose, and a right of action for damages was the only right of action which did arise, clearly was assignable. In this State even a right of action for a tort is assignable. (*Railroad vs. Harrison*, 1 Lea 1.) The effect of the previous assignment by Bates was to vest the right to the damages, when the right to damages arose, in the Federal Coal Company, and that company could compromise and receipt for, waive or release, or sue for the same. The right, however, was not one which was [fol. 31] assignable under the statute so as to enable the assignee to sue in his own name at law. At law the suit would have to be in the name of the assignor for the use of the assignee; but in equity it might be, as here, in the name of the assignee, making the assignor a party defendant.

Gibson, Sec. 122.

Upon an assignment of a contract, the right to hold an undisclosed principal liable passes to the assignee.

Mechem on Agency, Sec. 1769.

In the case cited by the author in support of this proposition, the right was expressly mentioned and included in the assignment, but I think it was included in the terms of the assignment in the case at bar.

II

By the contract of August 19, 1920, the Federal Coal Co. and Flanagan entered into a new contract, for purchase and sale of coal and by the same instrument agreed that the Tracy City Coal Co. should be released from all liability on the Bates contract. Was this new contract procured by fraud which entitles the Federal Coal Company to have it set aside and to be relieved from its agreement respecting the Bates contract? The charge of fraud is predicated upon two grounds, viz:

(1)

That Flanagan fraudulently concealed from the Federal Coal Co. the fact that he was the undisclosed principal in the Bates contract. This involves three propositions; first, that he was such undisclosed principal; second, that he concealed the fact; and third, that in the situation of the parties it was a material matter to the Federal Coal Company in making the new contract. It is a fact that Flanagan did not, at the time of making of the August 19th contract or at any time before, state to the Federal Coal Company's representatives, that he was the principal in the Bates contract or that he was personally bound to Bates for the fulfillment of that contract. He has never admitted it since that time, and by his counsel is strenuously arguing to the contrary now. There was nowhere any express agreement between him and the Tracy City Company, either written or oral, that he was to be the principal, which he can be charged with concealing. If he was principal, it was because the law imposed that obligation upon him from the facts constituting his relationship to the contract and to the Tracy City Coal Co. Upon consideration of all the evidence as to the facts I have reached the conclusion that he was liable as principal, but a good deal can be said in favor of the contrary view, and I cannot say that he was guilty of fraud in failing to reach the same conclusion as I do and disclosing it to the Federal Coal Company. No fact is pointed out which it was his duty to disclose and which he failed to disclose or concealed. On the contrary, in the draft of the tentative agreement of July 7, 1920, his relation to the Bates contract was all but explicitly stated, and enough was stated to put the Coal Company upon inquiry. Its managing officer, who passed upon this tentative agreement says he made no inquiry, and he does not claim that he was led not to make inquiry by any act or false statement of fact by Flanagan. I think it plain that the Federal Coal Company was not at the moment concerned about who was liable for the breach of the Bates contract. They were advised that they "could not get anywhere" in the enforcement of that contract, from which the fair inference is that they were under the im-

pression that that contract could not be enforced by the Federal Coal Co., as assignee, which was the position taken by the Tracy City Coal Company. Then, this was a time of feverish excitement. The price of coal was advancing by leaps and bounds. It was, as one of the witnesses calls it, a "run-away" market. What the Coal Company wanted was coal, not a claim for damages. So, for the sake of getting the coal, it was willing to release the old contract of doubtful enforceability in its hands, and make a new one which would [fol. 33] be at a price nearer the market price, than the old contract, and which called for completion of delivery within the time the excitement might be expected to last. When asked whether he would have made the new contract if he had known that he was getting no more than another promise from Flanagan, Mr. Thompson only says: "I think I probably would not have made it."

Failure to disclose a fact, the influence of which would have been as doubtful as is indicated by this answer, is not sufficient ground for avoiding a contract.

(2)

That the financial condition of the Tracy City Coal Co. was misrepresented to the Federal Coal Company.

The witness Chrosniak testifies that, after the conference held in Tracy City, on July 7th, at which a compromise agreement was tentatively agreed upon, Flanagan, Vice President and Manager of the Tracy City Coal Company, stated to him upon the street that a judgment against the Tracy City Coal Company for the damages for the breach of the Bates contract would force that company into bankruptcy, and that the same statement was made to him at another place on the same day by J. C. Beasley, the President of the Company. This is denied by Flanagan and Beasley, and for obvious reasons appearing in the record Chrosniak's statement cannot be accepted as true. On the occasion referred to Beasley did say to Chrosniak that a judgment against the company of the size suggested by him would "wipe it off the map" and that its paid in capital stock was only \$10,000. It is conceded for the Federal Coal Co. formally upon the record, that in making this statement, Beasley committed no fraud. In view of this concession, I am unable to see how this statement can be considered a ground for setting aside the contract for fraud.

Furthermore, while Chrosniak took part as a representative of the Federal Coal Co. in the negotiations for a new contract, he had no authority to decide upon and consummate the same. That was the [fol. 34] province of its general manager E. R. Thompson. It does not appear that Chrosniak ever communicated to Mr. Thompson either the statement which Beasley did make or the statement which he now says that Flanagan and Beasley both made, or that these statements influenced Mr. Thompson, in any way in entering into the contract of August 19th, with Flanagan. Mr. Thompson states that he had some information concerning the Tracy Coal Co.'s title and understood "in a general way even, if we get judgment we might not be able to collect it." (Q. 50, p. 41) He does

not say from whom he received this information, or that it led him to make any inquiries upon the subject. This only confirms what has been stated above, that he was not concerned with the question of responsibility for the breach of the Bates contract. This ground of fraud is not made out.

III

Was the contract of August 19th without consideration?

I think there was sufficient consideration. As constituting consideration, these things may be mentioned, viz:

(1) By the new contract the Federal Coal Company obtained the abrogation of the Bates contract. It is said for the Federal Coal Co. that if the Bates contract had been carried out, that company would have received under that contract, more coal up to December 31st 1920, the date of the expiration of the new contract, than the new contract called for, by 82 tons. This is true, and this fact alone would constitute a technically sufficient consideration. But the Bates contract did not end on December 31st. It called for a total of 18,000 tons with deliveries running to April 12, 1921, and what the net result would be upon the sum total of that contract no man could foretell.

(2) By the new contract the Federal Coal Company was brought into direct contractual relation with the seller, whereas under the Bates contract it was only assignee. For the reasons stated above, I think the Federal Coal Company could maintain suit for [fol. 35] the breach of the Bates contract, but its rights as assignee was in question at that time. When its representatives were urging the Tracy City Coal Company to make deliveries, they were reminded that it had no contract with the Tracy City Coal Company and advised to look to the Chattanooga Coal Company for its coal and found they "could not get anywhere." When they called upon Bates to take action against the Tracy City Coal Company, he reported that his lawyer advised him to sue the Federal Coal Company, not the Tracy City.

(3) The price in the new contract was under the then market price.

(4) Beasley's guaranty.

IV

Cause No. 18888

In this cause there remains to be considered only the insistence on behalf of the Federal Coal Company that the contract of August 19th was not effective to abrogate the Bates contract because the Tracy City Coal Company was not a party to the new contract. But Flanagan, the principal in the Bates contract, was a party to the new contract and could effectively agree to the cancellation of the

Bates contract. It is said that the defendants cannot rely upon this fact because in their pleadings they deny that Flanagan was principal, and claim that the Tracy City Coal Co. alone was bound on the Bates contract. But the Federal Coal is the plaintiff in this cause and in its bill alleges that Flanagan was the principal, and I have held that that is the fact.

Furthermore, while the Tracy City Coal Company was not nominally a party to the new contract, Flanagan and Beasley, its principal officers and the owners of all or nearly all of its capital stock, were parties to it. It is plain that from that time on the Bates contract was considered and treated by all the parties as cancelled. It is too late now to say that the Bates contract remained in force because the Tracy City Coal Co. was not a party to the contract of cancellation. It became a party by accepting and acting upon the contract made for its benefit.

The bill in this cause will be dismissed.

And upon the same grounds the cross bill in cause No. 18713 will be dismissed.

The failure to disclose to the Tracy City Coal Company the fact that the Chattanooga Coal Company was negotiating the Bates contract at the instance and for the benefit of the Federal Coal Co. and the failure to disclose the assignment of that contract to the Federal Coal Company was not a fraud upon the Tracy City Coal Company of which it can complain.

Cowan vs. Fairbrother, 52 L. R. A. 835.

V

Cause No. 18713

The breach of the contract of August 19th, was committed by the Federal Coal Company, not by Flanagan, and for no other reason, as frankly admitted by Mr. Thompson in his deposition in the Bates case, than that the parties to whom the Federal Coal Company sold the coal refused to take it. The effort to make out a technical breach by Flanagan is unsuccessful. He was able, willing and anxious to deliver the coal. By the practice of the parties from the beginning under this contract and the custom of the trade generally, he had the right to expect shipping instructions and to ship only on such instructions. There was a failure to ship the full 50 tons in September but this was due to the lack of shipping instructions. The claim that he should have gone on shipping to Godley & Griffith is not correct. That the Federal Coal Company intended that shipments to them should cease is plainly shown by Mr. Thompson's letter to them of Sept. 28, Exhibit Y to his deposition. No such claim was made at that time. Both parties continued to recognize the contract as in force. Flanagan begging for shipping [fol. 37] instructions and the Federal Coal Company promising to furnish the same but never doing so except for a few cars now and then; until finally in December Flanagan threatened to ship the coal to them at Chattanooga when he was told to ship and "bust

himself." It is claimed that this last mentioned expression evidenced consent to such shipment. What it meant was that the Federal Coal Company would not receive the coal and the loss would be Flanagan's. All this is too plain for argument.

But in making this contract and in delivering coal under it, Flanagan was engaged in the business of dealing in coal, i. e.: buying coal to sell again and selling it. He handled very little, if any, coal of his own production, and not anything like enough to fill this contract. In saying this I do not count the coal from the mines of the Tracy City Coal Company as his production. While he was the lessee under the lease from that company, yet at this time those mines were being operated by the Campbell Branch Coal Co. The record of his transactions which he files here shows that all the coal which he sold during this period he purchased from some other person or corporation, and all the coal which he delivered to the Federal Coal Company he bought from the Campbell Branch Coal Co. It is true that he was President of the Campbell Branch Coal Company, and probably owned all of its capital stock; nevertheless, it was the legal entity which operated the Tracy City mines and sold the coal to him. This was more than a merely legal conception. It had a practical effect. The price at which the corporation sold the coal to him was less than the price at which he sold it to the Federal Coal Company, and the royalty paid to the Tracy City Coal Co. was computed on the price which he credited to the Campbell Branch Coal Company. He himself calls the difference his commission or brokerage charge. He cannot get away from the fact, and ought not to be allowed to get away from the fact, that in this transaction he was a dealer in coal.

At the date of the execution of this contract Flanagan had paid the privilege tax for 3 months which the State of Tennessee imposes upon coal dealers and had a license for that period. But the license expired on Sept. 18th. The parties continued to operate under the contract after that date, and the breach did not occur until in December. If a license was necessary in the first instance, it was necessary as long as Flanagan continued to deliver or offer to deliver coal in execution of the contract. The license was never renewed or the tax paid after Sept. 18th.

It is insisted that a license was not necessary, because this was interstate commerce. It would be presumptuous for me to review the decision of the Supreme Court and undertake to define interstate commerce. In a very late decision, in the case of *Dahuker-Walker Milling Co. vs. Bondurant*, that court said:

"The commerce clause of the Constitution, art. I, Par. 8, cl. 3, expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter. Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well

the sale of the goods after they reach their destination and while they are in the original packages. *Brown v. Maryland*, 12 Wheat. 419, 446, 447, 6 L. ed. 678, 688, 689; *American Steel & Wire Co. vs. Speed*, 192 U. S. 500, 519, 48 L. ed. 538, 546, 24 Sup. Ct. Rep. 365. On the same principle, where goods are purchased in one [fol. 39] state for transportation to another, the commerce includes the purchase quite as much as it does the transportation." * * * A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause, *Crutcher v. Kentucky*, 141 U. S. 47, 57, 35 L. ed. 649. * * *

Hence it was held that a Tennessee corporation which purchased wheat in Kentucky from a Kentucky farmer, which it intended to ship to Tennessee, was not required to comply with the statute of Kentucky prescribing the conditions upon — foreign corporations might do business in that State. The purpose and intention of the buyer to transport the wheat out of the State in accordance with its previous practice, though this was not a part of the contract of purchase, was held sufficient to constitute the transaction interstate commerce and exempt the buyer from the statute. In the case at bar, it is proposed to extend the effect of the purpose and intention of the buyer to transport the coal out of the State, likewise no part of the contract, so as to protect the seller, also from the operation of a Statute of the State, although the seller was not a party to any contract for the sale or transportation of the coal outside of Tennessee, and his obligation ended with the delivery of the coal on the cars at Tracy City in this State. It is easy, of course, to say that there cannot be a purchase without there being at the same time a sale, and that if the purchase was a part of interstate commerce the sale must have been also. But the statute did not impose any tax upon the mere sale of the coal. Had this been Flanagan's coal he would not have been liable to the tax, no matter where or to whom he sold it. The thing that is taxed is the privilege of dealing [fol. 40] ing in coal. What made him liable to the tax was the fact that he was engaged in buying coal to sell again. Not having paid the tax and obtained a license to do that business, he cannot recover upon any contract for the sale of coal so bought.

Krittand vs. Corbett, 144 Tenn. 100.

If the insistence of counsel is correct, it seems to me that the principle would as a matter of logic (but interstate commerce is not a matter of logic) have to embrace the seller's vendor as well as the seller and so on to ramifications without limit.

The bill in this cause will be dismissed.

The costs of depositions will be equally divided, and complainant in each case pay the other costs in that case.

(S.) Garvin, Chancellor. 6/1/22.

[fol. 41] At a regular term of the Chancery Court of Hamilton County, Tennessee begun and held at the Court House in the city of Chattanooga, said State and County, on the first Monday, it being the 5th day of June 1922, present and presiding the Hon. W. B. Garvin, Chancellor in and for the Third Chancery Division of the said State, the following proceedings were had, viz:

[Title omitted]

Prosecution Bond

We are complainant's sureties for costs.

C. H. Garner, Allison, Lynch & Phillips.

[fol. 42] IN CHANCERY COURT OF HAMILTON COUNTY

Bill of Complaint of

JOHN D. FLANAGAN, Resident and Citizen of Grundy County, Tennessee, Complainant,

vs.

FEDERAL COAL COMPANY, a Corporation Organized and Chartered under the Laws of the State of Delaware, with Its Principal Office in Chattanooga, Tennessee, and Its Executive Officers Residents of Tennessee, Defendant.

ORIGINAL BILL OF JOHN D. FLANAGAN—Filed May 6, 1921

To the Honorable W. B. Garvin, Chancellor, Holding Chancery Court at Chattanooga, Tennessee:

Complainant would respectfully show the Court that he owns and operates coal mines, sells and ships coal from mines in Grundy County, Tennessee, and is also engaged and has been for several years in the coal brokerage business, that is to say, in buying and selling coal, in addition to selling the output of his mines which he has operated for several years in Grundy County, Tennessee.

The Federal Coal Company is also engaged in the business of mining, selling and shipping coal, and is also in the coal brokerage business, that is to say, in buying and selling coal on the market since it was chartered several years ago.

On the 19th day of August, 1920, the complainant and defendant entered into a contract, copy of which is herewith filed as Exhibit "A" to this bill, but same need not be copied. It will be observed that under the terms of this contract, complainant was to sell and deliver to the defendant two hundred cars of Tracy City R/M Coal [fol. 43] at \$9.00 per ton, F. O. B. Cars at the mines. The coal was

to be delivered between September 1st, 1920, and December 31st, 1920.

Complainant would further show the Court that it was able and willing at all times during the said time mentioned in said contract to deliver this coal to the defendant and to comply with the terms of the contract in every respect. Complainant began to call on the defendant for shipping instructions for this coal on September 1st, 1920, and shipped to said defendant every car of this coal that it could induce defendant's officers and managers to accept. From day to day and from week to week complainant begged the defendant's officers and managers in charge of its business to accept this coal, but during all this time it was only able to induce them to accept seventy-three cars, leaving one hundred and twenty-seven cars provided for in said contract which it utterly failed, refused and declined to accept. The price of coal began to decline very soon after this contract was entered into and declined rapidly during the entire life of the contract, and complainant charges that this was the reason that induced the defendant to breach this contract and fail and refuse to accept and pay for this coal. Complainant charges that if the defendant had accepted the coal at the time provided for in the contract; that is to say, fifty cars per month from September 1st to December 31st, complainant would have made a clear profit on the one hundred and twenty-seven cars, which the said defendant failed and declined to accept, of \$28,241.33. That is to say, the profit the complainant would have made in the month of September on the difference [fol. 44] ference on the amount of coal that the defendant did accept, and the fifty cars that it should have accepted for that month, and the profit it would have made on the coal that the defendant should have accepted in each of the three months thereafter, based upon the difference between the contract price and the market price during said months, make the sum of \$28,241.33. The difference between the contract price and the cost of production would be greater, and if the damage should be estimated on that basis, complainant's profit would have been greater than that above stated.

In December, 1920, the price of coal had reached its lowest depth, and this coal was worth on the market about \$2.00 per ton. If complainant is entitled to recover damages on the difference between the contract price and the market price at the time of the final breach of the contract on December 31st, 1920, then his damage would be the sum of \$40,000.00, which he is advised he is entitled to recover. Complainant expressly charges that he has complied with every term of this contract and offered and tendered this coal as provided for in the terms of the contract, and was ready, willing and anxious to comply with the same at all times, and he further charges that the defendant's breach of this contract is wholly without excuse and that said contract was breached simply because of the drop in the price of coal.

Complainant in all his dealings as a mine operator and coal broker, frequently uses the trade name of Cumberland Mountain Coal Company, but this is understood by all his customers to be merely a trade

name and that the transactions are all those of the complainant individually.

Premises seen, complainant prays that the defendant Federal Coal Company be made defendant by proper process returnable to the June Rule Day of this Court.

Let said defendant answer but not under oath.

Upon final hearing let complainant have a decree for the damages that he is entitled to recover for defendant's breach of the contract [fol. 45] sued on.

Let complainant have a decree of \$40,000.00, the difference between the contract price and the market price, which was more than the cost of production at the time of the final breach of said contract, December 31st, 1920. If the courts should hold that complainant's damages should be computed on the difference between the contract price and the current market price at the time the coal should have been delivered and received, then let complainant have a decree for the sum of \$28,241.33.

Grant complainant all other, further and special relief that he may be entitled to under the facts of this case, and grant general relief.

Jno. D. Flanagan, By Attys. C. H. Garner, Allison, Lynch & Phillips, Sols. for Complt.

[fol. 46] STATE OF TENNESSEE,

Hamilton County:

Personally appeared before me John D. Flanagan, who made oath in due form of law that the facts set forth in the foregoing bill are true to the best of his own knowledge and belief.

John D. Flanagan.

Sworn to and subscribed before me, this 5th day of May, 1921.

M. T. Hoobe, Notary Public.

[File endorsement omitted.]

[Endorsed:] No. 18713. Copy orig. bill. John D. Flanagan vs. Federal Coal Co. Issd. 6 May, 1921. Sam Erwin Com. P. E. McMillan D. Com.

[fol. 47]

EXHIBIT "A" TO ORIGINAL BILL

This contract, made this the 19th day of August, 1920, by and between John D. Flanagan, of Tracy City, Tenn. party of the first part and the Federal Coal Company, a corporation of Chattanooga, Tennessee, party of the second part.

Witnesseth: That the first party has this day sold, and hereby agrees and binds itself to deliver; and the second party has bought, and hereby agrees and binds itself to receive and to pay for, a certain quantity of coal, which, with the prices terms and conditions of sale is set out below:

Quantity.—Approximately two hundred (200) cars.

Grade & Size.—Tracy City Run of Mine.

Price.—Nine (\$9.00) Dollars per ton f. o. b. cars mines.

Shipment.—Approximately fifty (50) cars per month.

Time.—September 1, 1920, to December 31, 1920.

Weights.—This sale is made f. o. b. cars mines, and railroad weights are to govern all settlements.

Unavoidable Interferences.—First party is to use due diligence in making shipments as provided herein, but no liability for damage is to attach to first party when first party is prevented from making shipments by strikes, lockouts, wrecks, accidents, shortage of cars or labor, or other causes beyond its power to control.

Payments.—Payments for coal shipped under this contract to be made weekly, second party agreeing to forward check each Monday for coal shipped during previous week.

The quantities named above are minimum quantities, and party [fol. 48] of first part is obligated to ship this minimum quantity subject to conditions hereinbefore set out. Upon agreement of both parties the tonnage herein contracted can be increased to a maximum of six hundred (600) cars at the rate of one hundred fifty (150) cars per month.

In consideration of this sale by party of first part and faithful performance of this contract, party of second part agrees to release the Tracy City Coal Company from all liability under contract made about April 1st, 1920, between the Tracy City Coal Company and the Chattanooga Coal Company, which contract was assigned by the Chattanooga Coal Company to Federal Coal Company on the 7th day of April, 1920.

(Signed) John D. Flanagan, First Party. Federal Coal Co.,

By (Signed) E. R. Thompson, Sec. & Tres., Second Party.

(Signed) Irene Sansom, Witness.

J. C. Beasley, of Murfreesboro, Tennessee, by signature hereunder becomes the guarantor of party of first part to the extent of fifty cents (50¢) per ton on any of the tonnage contracted hereunder which party of first part fails to deliver to party of second part and which is not automatically cancelled by the provisions contained in this contract in regard to unavoidable interference.

(Signed) J. C. Beasley.

[fol. 49] IN THE CHANCERY COURT AT CHATTANOOGA, TENNESSEE

[Title omitted]

ANSWER OF THE FEDERAL COAL COMPANY—Filed June 29, 1921

This respondent for answer to the bill filed against it in the above entitled cause, says:

I

This respondent admits that it is a corporation and that on or about August 19, 1920, it signed a contract with complainant, but it does not admit that Exhibit "A" to the bill is a correct copy thereof, referring to the original contract for the evidence of its provisions.

The history of this transaction was that about the 1st of April, 1920, W. S. Bates, of Chattanooga, Tennessee, under the trade name of Chattanooga Coal Company, entered into a contract with the Tracy City Coal Company, a corporation of Tracy City, Tennessee, of which John D. Flanagan was an officer, or had some kind of interest. By the terms of this contract the Tracy City Coal Company bound itself to sell and deliver to the order of the Chattanooga Coal Company, 18,000 tons of coal, of 2,000 pounds each, f. o. b. cars at mines, at the price of \$3.90 per ton, and to make delivery at the rate of eight cars [fol. 50] per week, beginning April 12, 1920, and ending April 12, 1921, until the total tonnage of 18,000 tons had been delivered.

Predicated upon the said purchase the Chattanooga Coal Company sold to this respondent said 18,000 tons of coal which it had contracted to purchase from the Tracy City Coal Company, at an increased price of 20¢ per ton, stipulating the same deliveries. The Tracy City Coal Company made delivery of a small amount of this coal, when the market price advanced and the said Company breached its contract and failed and refused to make further deliveries.

This respondent had contracted to resell all of the coal, so purchased, and was under obligations to make delivery thereof at a price above \$9.00 per ton.

In this situation complainant John D. Flanagan represented to your respondent that he was engaged in the business of buying and selling coal in car load lots, as a broker, and that he had a substantial amount of coal for sale, and that he would sell the same to your respondent, solemnly agreeing to make prompt delivery and faithful performance of its contract, and asked that this respondent, in consideration thereof, release the Tracy City Coal Company from the liability of that Coal Company to respondent.

Respondent agreed with said Flanagan that this release would be made by it if Flanagan would sell and deliver to it the 200 cars of coal and a contract dated August 19, 1920, was prepared to this effect. Said coal was to be shipped and delivered by complainant Flanagan at the rate of fifty cars per month, beginning September 1, 1920, and ending December 31, 1920.

Notwithstanding his solemn obligation to do so, complainant John Flanagan failed to deliver to this respondent coal to the amount of fifty car load per month, as stipulated in the said contract, and failed to offer or tender to make delivery thereof, but breached his contract.

[fol. 51] Respondent further says that notwithstanding the complainant was at the time engaged in the business of coal broker, buying and selling coal in car load lots, with his place of business

situated in Grundy County, Tennessee, that he did not pay to the State of Tennessee the privilege tax levied upon wholesale dealers and brokers of \$25.00, nor to the County of Grundy the privilege tax levied by it upon wholesale dealers and brokers of \$25.00, and that he did not have a license which authorized him to engage in the business of buying and selling or dealing in coal in car load lots, at the time the contract was entered into, or during any of the time that this contract was to be performed.

Respondent says that by the provisions of Chapter 134 of the Acts of the Legislature of Tennessee of 1919, in force at the time this transaction took place, complainant was required to pay the privilege tax as a wholesale dealer and broker in coal, both to the State of Tennessee and to the County of Grundy, as a condition precedent to engaging in the said business. By the provisions of said Act it is made a misdemeanor for complainant to exercise said privilege without first paying the privilege tax and obtaining a privilege license therefor.

Respondent says that the contract herein was entered into in violation of the said provisions of law and is illegal and void, and complainant comes into this Court with unclean hands and has no right to maintain a suit in this Court on account of said contract.

II

Respondent specially denies that it breached its contract with complainant in any respect, or that it is liable to complainant in any amount and upon any account. The breach of contract was on the part of complainant.

[fol. 52] Respondent specially denies that complainant suffered damage to the amount of \$28,241.33, or damages to the Amount of \$40,000.00, or damages in any other amount, for which he has any right to sue in this Court.

All other matters in complainant's bill not herein expressly admitted are here and now specially denied.

And now having fully answered, respondent prays to be hence dismissed with its reasonable costs.

Federal Coal Co., By Chas. C. Moore, Sol.

[fol. 53] IN THE CHANCERY COURT OF HAMILTON COUNTY

ISSUES OF FACT—Filed September 27, 1921

1st. Was the complainant ready, able and willing to deliver to the defendant the coal he sold it under the terms and provisions of the contract sued on in this cause?

Ans. —.

2nd. Did the complainant offer to the defendant to deliver to it said coal as provided according to the terms and provisions of the contract?

Ans. —.

3rd. Did the defendant breach its contract and fail and refuse to receive said coal?

Ans. —.

4th. How much was the complainant damaged by the failure of the defendant to comply with the terms and provisions of the contract sued on in this cause?

Ans. —.

[fol. 54] DEPOSITIONS OF E. R. THOMPSON ET AL.—Filed February 6, 1922

Depositions Taken by Agreement of Counsel on Behalf of Complainant at the Office of Allison, Lynch & Phillips, Chattanooga, Tennessee.

Present: Representing complainant, C. H. Warner and J. J. Lynch; representing the defendant, C. C. Moore.

First witness for complainant, E. R. THOMPSON, being first duly sworn, deposed as follows:

Direct examination.

By J. J. Lynch:

Q. 1. How old are you and where do you live?

A. 39, I live in Chattanooga, Tenn.

Q. 2. What position do you hold with the Federal Coal Company? [fol. 55]

A. Secretary & Treasurer.

Q. 3. How long have you held that position?

A. A trifle over three years.

Q. 4. You are really the executive Manager, aren't you?

A. Yes, I am the only active official.

Q. 5. Are you the E. R. Thompson that signed the Federal Coal Company's name to the contract sued on in this case?

A. Yes, sir.

Q. 6. Mr. Thompson, have you the record showing the amount of coal that you received for the Federal Coal Company under this contract, and the date that each amount was received?

A. No, sir, there are such records in the office, I have not them with me.

Q. 7. Will you make up a statement and file it as Exhibit "A" to your deposition showing the amount of coal received and the dates, and to whom it was shipped?

A. Yes, sir.

Exhibit "A."

Q. 8. This coal was all ordered shipped to other people—other customers of yours, was it not?

A. I don't remember off hand just how it was shipped, there are various ways of handling those things and I don't remember off hand who it went to.

Q. 9. Was any of it shipped direct to you?

A. Here?

Q. 10. Yes?

[fol. 56] A. I could not say that without looking at the bill. I knew a lot of coal up there was shipped to us, for the N. C. & St. L. have a rather cranky idea about not letting cars go off their own line, and for that reason coal from that field we had it shipped to us and reconsigned.

Q. 11. Will you file as Exhibit 1, 2, 3, etc. in numerical order, the bills of coal covering the coal shipped you under this contract by Mr. Flanagan?

A. I will.

Exhibits 1, 2, 3, etc.

Q. 12. When I say you, I mean, of course, the Federal Coal Company?

A. Yes.

Q. 13. I mean coal billed under this contract regardless of the person to whom it was shipped?

A. That would merely be a duplication of your first request.

Q. 14. Yes, I am merely explaining what I want.

A. Yes, you have already requested the same information.

Q. 15. Now on contracts for future shipments, such as this contract, state whether or not it was your custom and the custom of the trade in this territory to order out from the seller, the coal as you desired it shipped, giving in this order, the person to whom you desired it shipped?

A. That was not always the case, but it was in some instances, it was worked both ways. On the N. C. & St. L. when there is a car [fol. 57] shortage, they would not take up there, an order, for instance, to Charleston, S. C., and for that reason most of the coal that got off that line was shipped to the Federal Coal Company, Chattanooga, Tennessee, although when the car situation was not so stringent we would sometimes have it shipped direct.

Q. 16. I mean was it the custom of the seller to ship the coal when he received an order from the purchaser under contract like this for future delivery?

A. Well, I would not say that there was an iron-clad custom one way or the other. It is true you more or less work that to the convenience of both parties;—might buy a hundred cars and say, well, ship this week to so and so and next week ship the next to so and so.

Q. 17. Was it the custom for the seller to ship when he received the orders and not ship direct without an order?

A. Well, while that is done in lots of cases, as I stated before, I don't think you would call that an iron-clad custom. I have had people insist on shipping when I don't want it shipped.

Q. 18. At least the rule I suggested was the usual usage in trade at that time, wasn't it?

A. The individual circumstances,—for instance, I have it in the last little while, that we had bought some coal and we expected [fol. 58] to give shipping instructions on it before it moved, but the party shipped it to Chattanooga and we had demurrage and re-consignment on us before we knew it. It is owing to the temperament of the parties and the particular circumstances.

Q. 19. Such an occurrence as you have just described is unusual and not the rule and custom?

A. It depends altogether on the party you are dealing with.

Q. 20. A thing of that kind does not happen often?

A. Not if the seller has got other orders, but if he has not got other orders he worries you to beat the band.

Q. 21. While he may worry you, that is, ask you when you are going to give him shipping instructions, he waits until you give him shipping instructions before he ships?

A. Not always.

Q. 22. I am asking about the usual thing?

A. I am only speaking from my own experience, and my own experience has been both ways. When we have bought the coal sometimes the seller will say nothing, other times, he may write a letter and demand shipping instructions; still other times, he just ships the coal.

Q. 23. In the majority of the cases, he awaits the shipping instructions before shipping, don't he?

A. I really could not say, possibly in more cases he would wait [fol. 59] than not, fearing complications should he ship without instructions.

Q. 24. I will ask you, if in this case, on one occasion, during the life of this contract Mr. Flanagan didn't call you up and insist on shipping the coal and you told him you had no shipping orders to give at that time, and he threatened to ship the coal to the Federal Coal Company, and if you didn't tell him if he did you would not take it, and he would have a lot of demurrage to pay?

A. I don't remember any such conversation, if he had it, it was probably with Mr. Chrosniak, he handled practically all the negotiations with Mr. Flanagan.

Q. 25. On the question of the custom and way of ordering coal out, I will ask you if you didn't have some blanks printed, on which you gave shipping instructions to your customers in cases like this?

A. Yes.

Q. 26. I hand you what purports to be an order to Mr. Flanagan, dated November 5th, 1920, and ask you if that is not written on one of those blanks?

A. Yes, sir, it is.

Q. 27. I will ask you if that is not the last shipping instructions you gave under this contract?

A. I could not say positively without looking up our records, [fol. 60] but I imagine that it is.

Q. 28. Will you file that as Exhibit "B" to your deposition?

A. I will.

Exhibit "B."

Q. 29. I will ask you if you ordered out any coal, or had any shipped to you under this contract except under shipping orders of this kind?

A. I don't remember any being shipped any other way.

Q. 30. Do you remember how often during the life of this contract Mr. Flanagan called you up and asked you why you didn't send shipping instructions?

A. No, sir, my recollection is that I didn't talk on the telephone at all, he talked to Mr. Chrosniak.

Q. 31. Who is Mr. Chrosniak?

A. My assistant in the office.

Q. 32. Mr. Chrosniak is present?

A. Yes.

Q. 33. He is the gentlemen whose name is signed to this order I have asked about?

A. Yes.

Q. 34. You never issued an order or request for any coal to be shipped during the life of this contract that was not shipped pursuant to your order or request?

A. I don't remember any, no, sir.

Q. 35. You have no complaint on the part of your customers that Mr. Flanagan failed to comply with his part of the contract when [fol. 61] the coal was requested to be shipped?

A. No complaint of that kind.

Q. 36. I will ask you if coal didn't steadily go down in price during the life of this contract?

A. Yes, sir, it did.

Q. 37. The contract price, the price at which you contracted to receive this coal, was less than the current market price of coal of that grade at the time the contract was entered into?

A. No, about market price.

Q. 38. I will ask you to refresh your recollection, if on that day you didn't buy some coal from Mr. Flanagan for \$10.00?

A. I may have for immediate shipment, but that was for shipment over a period of four months.

Q. 39. You mean the spot coal price was more than coal for future delivery?

A. Yes, this was for a period over four months and it was possible we paid more for coal for immediate shipment.

Q. 40. In other words, spot coal is coal that is already mined and ready to ship?

A. Almost, offer shipment immediately, today, tomorrow or two days from then.

Q. 41. Coal at that time, in days of high prices, will bring more than a contract for future delivery because you had the chance of a fall in price?

A. Yes, and if the markets go up you probably will not get what you ordered on the contract.

[fol. 62] Q. 42. And if it comes down you will not take it if you can help it?

A. Same way.

Q. 43. And that is the reason you didn't order this coal out, is because the price came down?

A. No, because it could not be delivered, we had it sold but our buyers would not take it.

Q. 44. And therefore you could not take it from these people?

A. Yes, sir.

Q. 45. In other words, it was the fault of the people to whom you had sold the coal, and not Mr. Flanagan's fault?

A. Yes, sir.

Q. 46. Didn't coal go down to \$2.00 in December?

A. We didn't handle any off that road and I cannot say from my own observation what the price was.

Q. 47. You do know a similar coal to that went very low?

A. Yes. I know good coal was pretty hard to sell, but I don't know what they were getting for that coal in December.

Q. 48. To refresh your recollection, didn't Mr. Flanagan call you up in October, November and December and request you to accept coal under this contract?

A. I don't believe he called me at all.

Q. 49. You understood during that time he had called up and made this request?

[fol. 63] A. In a general way I may have known he called up.

Mr. Moore: We except to what Mr. Thompson understood.

Q. 50. There was no doubt in your mind during the life of this but that Mr. Flanagan stood ready and willing to ship this coal?

Mr. Moore: We except as to whether or not it was a doubt in his mind, as it is not a material fact.

A. There was probably no doubt that Mr. Flanagan was willing to ship the coal of course, because the price of that contract was more than the current market price at the time.

Cross-examination reserved, as is further direct examination, pending the filing of exhibits called for.

Sworn to before me this 1st day of July, 1921. B. M. Gorman, Notary Public.

Next witness, JOHN CHROSNIAK, after being duly sworn, deposed as follows:

Q. 1. You are the Mr. Chrosniak referred to in the testimony of Mr. Thompson?

A. Yes, sir.

Q. 2. You are the gentleman representing the Federal Coal Company who went to Tracy City and negotiated this contract?

A. Yes, sir.

Q. 3. In other words, the contract was brought about by your solicitation?

A. Yes, sir.

Q. 4. I will ask you, Mr. Chrosniak, *now* often during the months of October, November and December, Mr. Flanagan called you up and asked for shipping instructions to ship this coal?

A. He probably called me about three times during that time.

Q. 5. Do you remember what month he called you up?

A. Well, it was in October. I was in Cuba in September and didn't get back until the 10th or 12th of October and it was after the 10th or 12th of October when Mr. Flanagan called me.

Q. 6. You mean after that when he called you the first time?

A. Yes, sir.

Q. 7. Do you remember the date of the last conversation in which he called on you for shipping instructions?

A. Right after that Key West order was completed.

Q. 8. At any rate it must have been along in December when the last conversation occurred?

A. Yes, it was after that order was completed I had my last conversation with Mr. Flanagan.

[fol. 65] Q. 9. I will ask you if you didn't tell Mr. Flanagan that if he shipped any coal direct to the Federal Coal Company without specific orders you would turn it down and he would have a lot of demurrage on his hands?

A. No, sir. Mr. Flanagan had threatened me of the fact he was going to ship this coal, and I told him to "bust" himself, over the telephone, if he wanted to ship that coal to Chattanooga, that it was alright.

Q. 10. That he would have the demurrage on his hands?

A. No, sir.

Q. 11. What do you mean by "bust" himself?

A. Go ahead and ship it all to Chattanooga.

Q. 12. You meant by that you would not accept it?

A. No, I didn't say anything about that.

Q. 13. You told him to "bust" himself, what did you mean?

A. Ship the whole thing to Chattanooga and it would be alright, that is the word I used.

Q. 14. That is what you said, if you do it, you will "bust" yourself?

A. Said go ahead and "bust" himself; that is a word that is generally used in a piece of business like that.

Q. 15. Were you needing the coal at that time?

A. No.

Q. 16. The people you had sold it to would not take it?

A. No.

[fol. 66] Q. 17. And you didn't want it?

A. We would have taken it if it had been shipped to us.

Q. 18. You didn't tell him so?

A. I told him to "bust" himself, meaning he could go ahead and ship all that coal to us.

Q. 19. You now say that is what you meant, but he didn't know what you meant?

A. He knows what I meant.

Q. 20. Don't you know when he was having to sell it for \$2.00 he would have been glad to have sent it to you at \$9.00 if he thought you meant any such thing?

A. That was up to him, he never did tender the coal to us after he filled that last order.

Q. 21. You mean ten days after November 5th he didn't tender it any more?

A. No.

Q. 22. That was after the contract expired?

A. No, during the time that that order was in effect Mr. Flanagan had at no time called us and asked us for shipping instructions.

Q. 23. You said awhile ago he asked you three times?

A. That was prior to the time we gave him that order and after it run out.

Q. 24. Then you mean after November 6th he didn't call you [fol. 67] except on one time when you told him to "bust" himself?

A. Yes, sir.

Q. 25. Was that in December or January?

A. I could not say.

Q. 26. But you know it was after it expired?

A. After that order was completed.

Cross-examination and further examination will be reserved until exhibits have been filed in preceding deposition.

Sworn to before me this 1st day of July, 1921. B. M. Gorman,
Notary Public.

Dr. D. W. HEMBREE, next witness, after being duly sworn, deposed as follows:

Q. 1. How old are you?

A. 45.

Q. 2. Where do you live?

A. Tracy City.

Q. 3. What is your business?

A. Physician.

Q. 4. I will ask you if you also deal in coal?

A. Yes.

Q. 5. I will ask you if during the year 1920, especially the Fall months of 1920, you were in the coal business in Tracy City?

A. Yes.

Q. 6. I will ask you if you had any dealings with John Flanagan by way of selling him coal?

[fol. 68] A. Yes, sir.

Q. 7. Were you in his office frequently or not?

A. Yes, sir.

Q. 8. I will ask you whether or not you on any occasion, if so on how many occasions, went to see him, and if so what about?

A. I was up there almost daily. I had coal to sell; I took weights up and he would give me a check, I was up there, I expect almost every day.

Q. 9. I will ask you if on any of these occasions you heard him call the Federal Coal Company at Chattanooga over long distance for any purpose?

A. Yes.

Q. 10. On how many occasions?

A. I don't know just how many but I expect a half dozen times.

Q. 11. During what month did you hear this conversation?

A. Sometime in November or the first of December, somewhere along there.

Q. 12. Do you think some of the conversations were as late as December?

A. I think possibly, maybe the first of December anyhow, along in the Fall months.

Q. 13. Do you know who he called at Chattanooga?

A. He called for the Federal Coal Company and wanted to talk to Mr. Thompson.

Q. 14. Did you hear what he said?

A. I heard what Flanagan said.

[fol. 69] Q. 15. What did Mr. Flanagan say?

A. He would ask Mr. Thompson, or the Federal Coal Company if they could take coal.

Mr. Moore: The foregoing question and answer excepted to because it does not appear that the conversation listened to was with any responsible person representing the Federal Coal Company.

Q. 16. I will ask you to refresh your recollection, whether or not in these conversations he would ask why they had not sent him shipping instructions?

Mr. Moore: The foregoing question excepted to because leading.

A. Yes, sir, I have heard him ask him if he could give him the order placing coal that was on his contract.

Q. 17. Who would Mr. Flanagan address in these conversations?

A. He would say Mr. Thompson.

Q. 18. How many of these conversations occurred as late as November, if you remember?

A. I don't know just exactly the time, I could not say just how many.

Q. 19. You know nothing of your own knowledge about the persons to whom he sold your coal?

A. No, I could not say to whom he sold the coal. I understood he [fol. 70] was selling some of the coal because he called when I was in there before he would tell me he would take my coal.

Q. 20. Did you hear the call put in by Mr. Flanagan for the Federal Coal Company over long distance?

A. Yes, sir.

Q. 21. Would you stay and hear the conversation that ensued when he got the number?

A. Yes, I did a number of times, not always.

Q. 22. How many times did you stay and hear the conversation?

A. As many times as half dozen times.

Q. 23. Do you mean or not, in addition to this half dozen calls, you had heard him put in other calls?

Mr. Moore: Excepted to because leading.

A. Yes, I think I have heard him.

Cross-examination.

By C. C. Moore:

Q. 1. If I understand you, Doctor, the occasion for your hearing a conversation of this kind would be the fact that you would offer Mr. Flanagan coal and he was seeking a market for it or a place where he could turn it?

A. Yes.

[fol. 71] Q. 2. And that was true, you think, in each instance when you heard the conversation?

A. Yes, said he had a contract with these people.

Mr. Moore: I didn't ask that.

Re-examination.

By J. J. Lynch:

Q. 1. Did he show you his contract with the Federal Coal Company?

A. Yes, sir.

Q. 2. I will ask you whether or not you were also a Director in the Staub Coal Company?

A. Yes.

Q. 3. I will ask you whether or not they sold Mr. Flanagan a large amount of coal for the purpose of filling this contract with the Federal Coal Company?

A. Yes, sir.

Q. 4. I will ask you whether or not at the time the Federal Coal Company was failing to take Mr. Flanagan's coal, he was also called upon to take coal from the Staub Coal Company?

A. Absolutely yes.

Q. 5. I will ask you whether or not your Company, the Staub Coal Company is claiming damage off Mr. Flanagan for failure to take that coal?

A. Sure.

And further this deponent saith not.

[fol. 72] Sworn to before me this July 1st, 1921. B. M. Gorman,
Notary Public.

Next witness, JAMES K. WERNER, after being duly sworn, deposed as follows:

Q. 1. Mr. Werner, are you connected with the Staub Coal Company?

A. Yes, sir.

Q. 2. In what capacity?

A. General Manager.

Q. 3. I will ask you whether or not your Company sold Mr. John D. Flanagan a lot of coal to help fill his contract with the Federal Coal Company in the fall of 1920?

Mr. Moore: The foregoing is excepted to because it is incompetent and irrelevant.

A. Yes, sir.

Q. 4. I will ask you whether or not as the result of this matter, you were at the office of Mr. Flanagan in Tracy City often or not?

A. Yes, sir, especially after prices begin to drop.

[fol. 73] Q. 5. You mean you were after him to take the coal?

A. Yes, sir.

Q. 6. I will ask you if at any time you were there for that purpose you hear- him call up over long distance the Federal Coal Company?

A. Yes, sir.

Q. 7. Who did he call for at the Federal Coal Company?

A. He called for the Federal Coal Company and asked to speak to Mr. Thompson the evening I was in there with Dr. Hambree.

Q. 8. Did you hear the conversation when the call was completed?

A. Yes, I heard Mr. Flanagan.

Q. 9. What did he say?

A. He asked him was that Mr. Thompson talking and then went on to talking and asked him when he was going to give him shipping instructions on that contract, and of course I didn't hear Mr. Thompson's reply.

Q. 10. Have you ever seen the contract between the Federal Coal Company and Mr. Flanagan?

A. Yes, sir, I have seen it several times.

Q. 11. I will ask you whether or not the Staub Coal Company is now claiming damage against Mr. Flanagan?

A. We are going to hold him to it if we can, of course.

Q. 12. When was this conversation?

[fol. 74] A. I am not positive about that, I would say sometimes in November, the latter part of November I think, either that or the first part of December.

Q. 13. Did you hear more than one conversation?

A. I can't positively say, I was up there several times, but I would not be willing to swear that, but I would be willing to swear to this particular conversation.

Q. 14. Do I understand you went there several times when he put in the calls but you only stayed one time and listened to the conversation?

A. Yes, sir.

Mr. Moore: The foregoing is excepted to because leading.

• Q. 15. The conversation that you did hear was in the latter part of November or the first part of December?

Mr. Moore: The foregoing is excepted to because leading.

A. Yes, sir.

Cross-examination.

By C. C. Moore:

Q. 1. You only definitely remember one conversation, I believe, Mr. Werner?

A. I remember one conversation; I definitely remember the one when Mr. Flanagan called for Mr. Thompson and asked if Mr. Thompson was there, but I was there several times when the calls [fol. 75] were put in but didn't pay much attention to it at that time.

Q. 2. You, of course, didn't know who he talked to at the other end of the line other than you heard him call for Mr. Thompson?

A. I heard him call for Mr. Thompson. I heard him say is this Mr. Thompson and went on to talk.

Q. 3. Have you anything with which you associate that conversation with which you fix the time?

A. No, sir, I can't positively say, only thing I remember about the time, it was a rainy dreary day, I remember that positively, it was a very disagreeable day.

Q. 4. Was Mr. Hembree with you on that occasion?

A. Yes, we were there together.

Q. 5. Where is Mr. Flanagan's office that you were in at that time?

A. It is over the Barber Shop.

Q. 6. In Tracy City, Tenn.?

A. Yes.

Q. 7. This was a telephone conversation that you heard?

A. It was, yes, sir.

Q. 8. Where was Mr. Flanagan at the time he was talking?

A. Sitting at his desk.

Q. 9. Using a desk phone?

A. Yes, sir.

Q. 10. Was Mr. Hambree in any way associated with you in business at that time?

[fol. 76] A. Yes, he is a member, or stockholder of the Staub Coal Company.

Q. 11. Was Mr. Hambree also mining coal on his own account?

A. He was.

Q. 12. Where was the Staub Coal mines located?

A. Located on the "Q" switch spur in Grundy County, about four miles from Tracy City.

Q. 13. Was the contract which the Staub Coal Company made with Mr. Flanagan about which you have testified in writing?

A. It was.

Q. 14. Do you remember the date of it?

A. No, I don't remember the date, but I could get it.

Q. 15. Was Mr. Flanagan regularly engaged in the business of buying and selling coal?

A. Yes, sir.

Q. 16. What name or style did he do that business under?

A. The Cumberland Mountain Coal Company.

Q. 17. Was that the name he used for his personal business?

A. That is what I understand.

Q. 18. Where did he conduct that business?

A. Tracy City.

Q. 19. In this office to which you have referred?

A. Yes, sir.

Q. 20. Did he buy and sell in wagon lots or in carload lots?

A. I could not reply positive.

[fol. 77] Q. 21. The dealings you had, was it in wagon lots or carload lots?

A. Carload lots.

Q. 22. So far as you know he never dealt otherwise than carload lots?

A. No.

Q. 23. He claimed to be in the business of buying and selling in carload lots.

A. The coal we sold him we sold him in carload lots.

Q. 24. Did he run a coal yard in Tracy City as far as you know?

A. He did not as far as I know.

Q. 25. Did he operate a mine personally?

A. Yes, he operated a mine just North of our property.

Q. 26. Was that his or belonged to—

A. His, personally as far as I know.

Q. 27. What kind of mine?

A. Wagon mine.

Q. 28. About what output would it have per week or per day?

A. I am not in position to say.

Q. 29. You are acquainted with it I judge, in a general way approximate it?

A. I expect he could run 75 tons a day, I don't know; that is just my estimate of it; say 75 tons, that is 50 tons.

Q. 30. That is approximately a carload a day?

A. Yes, sir.

Q. 31. You don't have any personal knowledge of what he did [fol. 78] produce at that place?

A. No, sir, because I was in and out of town.

Q. 32. What was the car supply on the Tracy City branch in and around Tracy City, say in the month of August of last year?

A. I should say right around 100%, say 95%.

Q. 33. Did it improve afterwards or get worse?

A. I could not see any change in it.

Q. 34. By 95%, explain what you mean?

A. I would say that meant 95% of the working days; of course we almost had 100% car supply; some days we would be out,

course; the switch engines were late, and one or two days I know we were out on account of cars.

Q. 35. Your operations, I take it, were situated similar to other operations in the Tracy City territory, so that your car supply would be a fair index of other car supplies?

A. I should think so.

Q. 36. What was the labor condition during that period?

A. Labor was in demand like it was anywhere else.

Q. 37. Was it hard to get or easy to get?

A. We didn't experience so much difficulty in getting the labor, of course you had to pay for it.

Q. 38. Pretty high priced?

A. Yes, sir, right high priced.

Re-examination.

By J. J. Lynch:

[fol. 79] Q. 1. From your experience, do you or not know what the price of coal was during the Fall of 1920?

A. I can tell you approximately what we were offered for coal.

Q. 2. I will ask you whether or not "run of mine" coal went down to about \$2.00 in December?

A. Coal went to \$2.00 and \$2.25 in December.

And further this deponent saith not.

Sworn to before me this first day of July 1921. B. M. Gorman,
Notary Public.

E. R. THOMPSON, being recalled by J. J. Lynch, deposed as follows:

Q. 1. Mr. Thompson, you were a very busy man during the Autumn of 1920?

A. Yes, sir.

Q. 2. Your duties were very extensively covering the territory of several States?

A. Yes, sir.

Q. 3. You would not undertake to try to remember every conversation [fol. 80] you had with various business men with whom you have had contracts?

A. No, sir.

And further this deponent saith not.

Sworn to before me this first day of July 1921. B. M. Gorman,
Notary Public.

Next witness, JOHN D. FLANAGAN, being duly sworn deposed as follows:

Q. 1. Are you the complainant in this case?

A. Yes.

Q. 2. Where do you live?

A. Tracy City.

Q. 3. How long have you been in the coal business, if you are in the coal business?

A. Off and on for a number of years.

Q. 4. Will you produce your receipt from the State and County showing you had paid your license as a coal dealer at the time this contract was entered into, and file it as Exhibit "A" to your deposition?

A. Yes, sir.

Exhibit "A."

Q. 5. I herewith hand you a paper purporting to be a contract [fol. 81] between John D. Flanagan and the Federal Coal Company, and will ask you if that is the contract you are suing on in this cause, and if so will you file it as Exhibit "B" to your deposition?

A. Yes, sir, it is and I will file it as Exhibit "B".

Exhibit "B".

Q. 6. I will ask you if you approached the defendant's Officials to enter into this contract or if you were requested by them to enter into it?

A. I was requested by them.

Q. 7. In what way?

A. Mr. Chrosniak came to Tracy City, he was up to Tracy City often buying coal; coal was \$10.00 a ton at the time, he wanted a contract—I didn't much want to contract, but he was very enthusiastic over contracting for four months at \$9.00; that was \$1.00 less than the market price, but I had another little contract with them, which was kicking around, so he proposed if I would make this contract with them the Federal Coal Company would cancel this other contract, or he would recommend for them to do that, and I finally agreed I would do that. He came to Chattanooga and talked it over with Mr. Thompson, I suppose, and called me up and asked me to come over the next day and go over it with Mr. Thompson, he was sure we could get together on it, and I did so.

[fol. 82] Q. 8. Did you and Mr. Thompson reach terms of the agreement?

A. Yes.

Q. 9. Who dictated the terms of the contract?

A. Mr. Thompson.

Q. 10. Mr. E. R. Thompson?

A. Yes.

Q. 11. The Secretary & Treasurer?

A. Yes. It was dictated several times and little clauses back and forth changed.

Q. 12. Who signed it for the Federal Coal Company?

A. Mr. Thompson.

Q. 13. Is that your signature to the contract (handing witness contract)?

A. Yes, sir.

Q. 14. I notice an annex signed by Mr. Beesley, why was that offered?

A. Mr. Thompson was very much in hopes this contract would be lived up to, and the coal would be delivered. He refused to go into it until I would give him security I would deliver this coal as the contract called for it, we split up a little on it and I went back to take it up with Mr. Beesley, and see if I could get him to sign this as personal security, which he agreed to do. I sent them both back to Mr. Thompson and he signed it and returned it to me.

Q. 15. It was signed in duplicate?

A. Yes.

Q. 16. Mr. Thompson has one copy and you one?

[fol. 83] A. Yes.

Q. 17. Under what trade name did you do business?

A. Cumberland Mountain Coal Company.

Q. 18. Was that a corporation or mere trade name, anybody else have any interest in it besides yourself?

A. No, sir.

Q. 19. I will ask you if there was any custom of delivery in this territory with reference to how the coal was ordered out by the purchaser from the seller?

A. Yes, sir, I never shipped a car of coal on a contract, or otherwise, to the Federal Coal Company, or any other coal company, without receiving their written form of shipping instructions; they all use them, and all have their forms.

Q. 20. I will ask you whether or not it is the custom for the purchaser to send in written instructions before coal is shipped out?

A. Yes, sir always.

Q. 21. I will ask you whether you shipped any coal under this contract direct to the Federal Coal Company?

A. No, sir.

Q. 22. In what way did you ship it; under the contract?

A. According to their written instructions—shipping instructions.

Q. 23. I will ask you whether or not the form filed as Exhibit "B" to Mr. Thompson's deposition is the form they used for ordering out this coal?

[fol. 84] A. Yes, sir.

Q. 24. Will you procure and file as Exhibits 1, 2, 3, 4, etc. in sequential order, all of these shipping instructions that you find in your file?

A. I will.

Exhibits 1, 2, 3, 4, etc.

Q. 25. Do you know whether you can find all of them or not?

A. I don't know, we didn't consider them very important, I don't know whether or not they were all retained.

Q. 26. Have you the bills under which you shipped this coal?

A. Yes.

Q. 27. Will you produce these and file them and number them after numbering the shipping orders referred to?

A. Yes, I have all those.

Q. 28. I wish you would state how much coal you shipped under this contract and the month in which you shipped it?

A. In September I shipped 36 cars, 1,983.95 tons, in October I shipped 7 cars, 411.65 tons, in November I shipped 14 cars, 732.35 tons, in December 16 cars, 831.45 tons, total \$3,959.41, the total cars, 73, balance, cars undelivered, 127. The average weight of each car which we shipped was 54.23 tons.

Q. 29. I wish you would state the market price for coal described in your contract as mined in the Tracy City territory the latter part of October, the latter part of November and the month of December?

[fol. 85] A. I haven't just all that data but from the 15th of August to the last of August, coal sold at \$10.00 per ton. I sold the Federal Coal Company a lot of coal during this period at \$10.00. On the day we made this contract I sold and shipped them coal at \$10.00 up until the last day of the month. The first of September coal begin to decline and dropped from \$10.00 to \$9.75 on the first of September, and payed between \$9.75 and \$9.50 until about the 15th of September. Then it continued to decline until the coal shipped in the last part of September was shipped at \$7.50. I have not the exact dates with me on the decline between that and December, except that it gradually came down pretty rapidly to \$2.00 per ton in January. We shipped a number of cars of coal in December at \$2.00 per ton.

Q. 30. About what time in December did the coal go to \$2.00?

A. We shipped coal on the 4th day of December at \$2.00 to the U. S. Fuel Corp.

Q. 31. I will ask you if it maintained that price during the month?

A. Practically so.

Q. 32. I will ask you if you stood ready and willing at all times during the life of this contract to fill it, or to the contrary?

A. Yes, I was ready to fill it.

[fol. 86] Q. 33. I will ask you whether or not you so informed the defendant's Officers at any time or times, during that period, and if so, in what way, just state this matter in your own way?

A. Yes, sir, I informed them many, many times, both Mr. Chrosniak and Mr. Thompson, and the stenographer.

Q. 34. In what way?

A. By telephone conversation altogether. One time, I had put in calls a number of times, and Mr. Thompson and Mr. Chrosniak were both out of town and I talked to Mr. Thompson's stenographer and of course, she could not give me any information, but I talked to her in their absence and asked her if there was anything she could do to help me out on this shipment, but of course she was powerless.

Q. 35. Do you remember the month in which you called Mr. Thompson?

A. I called him in every month.

Q. 36. You mean in every month during the life of the contract?

A. Yes, sir, and was in to see him a number of times.

Q. 37. Did you call him over long distance in November and December?

A. Yes, he and Mr. Chrosniak both.

Q. 38. What did you say to Mr. Thompson in these conversations? [fol. 87] A. We talked about the jump in the market, and coal was coming down, he was stalled on his contract, I was sorry for him, he could not take the coal he said, but he was always making an honest effort and would be able to take it in a few days.

Q. 39. I will ask you if you ever called him and asked for shipping instructions?

A. I asked him time after time and told him I was going to ship it to the Federal Coal Company in Chattanooga. He told me they would reject it and it would be on demurrage at my expense. I asked him what I must do with it, he said the best thing was to leave it in the ground.

Q. 40. I will ask you to state if you remember the month in which this conversation took place?

A. No, sir, but it was the latter part of the time in which the contract was made.

Q. 41. I will ask you where you were when you had this long distance conversation?

A. In my office.

Q. 42. Is that at Tracy City?

A. Yes.

Q. 43. I will ask you whether or not you recognized his voice in the conversation?

A. Yes, sir.

Q. 45. Do you know Mr. Chrosniak's voice?

A. Yes.

[fol. 88] Q. 46. Did you have any conversation with him?

A. Yes, fifteen or twenty or twenty-five.

Q. 47. Did you ask him for shipping instructions?

A. Yes.

Q. 48. Did you get them?

A. Sometimes, you see they were taking a little coal all along as we show here, and they would say, well, I will give you some later, and Mr. Thompson would say Chrosniak is off now trying to get business and thinks he will land some business in a day or two, you know business is shot all to pieces, I said, yes, but that is hard on me, he said, hard on me too, but he would have some shipping instructions in a day or two, and maybe I would get shipping instructions for two or three cars.

Q. 49. Did you get any shipping instructions after November 5th?

A. No.

Q. 50. I will ask you if you called for any after November 5th?

A. Yes.

Q. 51. Mr. Flanagan I will ask you whether or not the statement that "business was shot all to pieces" was true?

A. Yes, sir; and concerning this order of November 5th, they had

been talking of this Government business for a month, and Mr. Thompson had told me Mr. Chrosniak had been off on two or three [fol. 89] occasions to see about it, and finally Mr. Thompson called me and said he could give me 30 cars at \$8.50, and I told him I could not accept it for less than the contract price. He said the market was all to pieces, which it was; said he would give it to me at \$8.50. I would not accept it then, but went to see my lawyer and explained it all to him.

Mr. Moore: We except to what you told your lawyer.

Q. 52. I will ask you whether or not you conferred with your lawyer as to whether or not you were prejudicing your rights in not accepting this offer?

A. Yes, sir.

Q. 53. After this conference I will ask you whether or not you notified the Federal Coal Company you would make a reduction of 50-cents per ton on this one order?

A. I called up the next morning and Mr. Thompson came on the line and I started to tell him what I wanted to talk about and he said, wait a minute, and Mr. Chrosniak came on the line, and I told him I would accept those thirty cars at \$8.50 per ton with the understanding that they were applied on my contract just as that much tonnage and for no other reason whatsoever.

Q. 54. I will ask you if you remember a conversation in which you threatened to Mr. Chrosniak to ship direct to Chattanooga to [fol. 90] the Federal Coal Company, regardless of shipping instructions?

A. No, sir.

Q. 55. If Mr. Chrosniak had said to you to go ahead and bust yourself, what would you have understood from it?

A. I would have understood very serious threats, and as a matter of fact, under such a statement as that a man would not have shipped 127 cars of coal to the City of Chattanooga on a \$9.00 contract with coal selling at \$2.00 per ton. As I would have taken it, and I think it would have been absolutely true, the word he used "bust myself" would have meant in a fair way that, in a financial way, is what it would have done to me, but if he had said that to me, and I had the slightest idea in the world he would have meant they would have accepted the coal, I would have shot it to him in two minutes.

Q. 56. I will ask you whether or not during this time you were being besieged to take this coal from people whom you contracted with?

A. —

Mr. Moore: We except to the foregoing question because it is incompetent and irrelevant.

A. Yes, sir.

Mr. Moore: We except to the answer for the same reason.

[fol. 91] Q. 57. I will ask you whether or not you said to Mr. Thompson and Mr. Chrosniak you were being pressed by these people to dispose of this coal?

A. Yes, sir.

Cross-examination.

By C. C. Moore:

Q. 1. Mr. Flanagan, how long were you engaged in this business of buying and selling coal?

A. Not long prior to this.

Q. 2. About how long?

A. Probably two or three months.

Q. 3. How long did you continue in that business?

A. Well, not very long.

Q. 4. About how long?

A. I believe, I am not certain whether I went out of business at the close of December or January.

Q. 5. Went out of business about the time of the termination of this contract?

A. Not long afterwards—business went off and left me.

Q. 6. Did you obtain this license that you filed before you *begin* business?

A. About the time.

Q. 7. This the only license you obtained?

A. I don't know, I don't remember.

Q. 8. The only one you remember?

A. I don't remember whether or not there is any more.

[fol. 92] Q. 9. There is no more as far as you remember?

A. I will look and if I can find any others I will file them.

Q. 10. I am asking you whether or not you remember any others?

A. I don't remember.

Q. 11. You kept this one tacked up in your office, didn't you?

A. No, sir.

Q. 12. Didn't keep it posted—

A. It was out open, it was never tacked up.

Q. 13. How was it put up?

A. I don't remember.

Q. 14. It was posted up?

A. It was out open in the office.

Q. 15. Who made the alteration in this paper?

A. Which alteration is that?

Q. 16. In the name?

A. The Clerk who drew it.

Q. 17. When did he make that?

A. I don't remember, I think it was a few days after the license was issued.

Q. 18. Why do you think it was a few days after the license was issued?

A. I remember the occasion, but don't remember whether it was right away or not, it was done by the Deputy, Mr. Roddy, T. B. Roddy.

Q. 19. Does Mr. Roddy keep an office?

A. Yes.

Q. 20. Where?

A. Tracy City.

[fol. 93] Q. 21. Does he keep an office in Tracy City for issuing privilege license?

A. I don't know.

Q. 22. Did you obtain that license in person?

A. I think I telephoned and received it in person.

Q. 23. Paid and receipted for it in person?

A. Yes, sir.

Q. 24. You think it was some time after that that the alteration was made?

A. Few days afterwards.

Q. 25. How come him to make this alteration?

A. I saw it was not just right and I took them back and pointed it out and he made the change.

Q. 26. Where did he make the change?

A. I think it was in his office.

Q. 27. Where is his office?

A. In his store at the Court House.

Q. 28. You went to his store and the change was made there?

A. Yes, sir.

Q. 29. You don't recall how long after the license had been issued until that change took place?

A. Just a few days.

Q. 30. What kind of business did you conduct, Mr. Flanagan, did you have a coal yard and sell in wagons to the retail, or buy in carload lots?

[fol. 94] A. Bought and sold and produced in carload lots.

Q. 31. Did you have a coal mine of your own?

A. Yes, sir.

Q. 32. About how much coal did your coal mine produce?

A. Some days two or three cars and other days none.

Q. 33. And on an average how much coal per week would it get out?

A. I had several different little wagon operations, I guess on an average, probably a car a day.

Q. 34. That is from your several little operations that you referred to?

A. Yes.

Q. 35. Were each and all of these operated continuously, or just one here and there and yonder?

A. No, as long as the Federal Coal Company took coal on their contract, that had quite a bit to do with the regular running of the mines.

Q. 36. Why did that have a good deal to do with the running of the mines?

A. Because the market came down to such a point it was not profitable to operate the mines; when I would get an order from them I would run my mines.

Q. 37. When did the market go down so it was not profitable to operate these mines?

A. I operated them some all the way through and sometimes [fol. 95] when I would get promises of shipment, I would load coal and then be compelled to sell it to others. As a matter of fact, however, I had coal bought and contracted for, and coal was accessible from this production to have filled two or three contracts of the size I had with the Federal Coal Company; it was not from the scarcity of coal or any fault of mine.

Q. 38. Did you have enough coal bought to fill two or three contracts the size of this?

A. I had it bought and contracted for. I was handling a large tonnage perproduced by the Tracy City Coal Company, and also had the Staub Coal contract for a pretty good size tonnage to apply on this contract.

Q. 39. How much did you have bought from the Staub Coal Company?

A. I think about 5,000 tons, of which I took a part.

Q. 40. In cars, how much would that be?

A. About 100 cars.

Q. 41. How much of that did you take?

A. I took probably little over half I guess.

Q. 42. Did you have coal bought from any one else except the Staub Coal Company?

A. I didn't have contracts with them.

Q. 43. That was the only contract?

A. Yes.

Q. 44. Did you buy some coal from Dr. Hembree?

A. Yes, I bought from him.

Q. 45. Had you bought from him before this contract was entered into?

A. Yes.

Q. 46. About what quantity of coal did Dr. Hembree have to offer?

A. I would say from five to ten cars a week.

Q. 46. Were you handling all of his output?

A. No, not necessarily.

Q. 47. The coal that you bought from Dr. Hembree, was that shipped on this contract to the Federal Coal Company?

A. Sometimes.

Q. 48. You had other customers besides this contract?

A. Yes, all the coal that was delivered on the Staub Coal account was shipped on this contract.

Q. 49. How much of the coal was shipped on this contract?

A. Not very much I don't think.

Q. 50. Can you ascertain and give to the stenographer as to how much in fact was shipped on this contract?

A. Yes, I have not got it with me.

Q. 51. Was coal from any other mines except from Hembree and the Staub Coal Company shipped on this contract?

A. Yes.

Q. 52. What other?

A. Tracy City, and I guess from several others.

Q. 53. You have got the information at your office?

[fol. 97] A. Yes.

Q. 54. Will you please make up a statement in connection with the statement that has been called for and show on that statement the source from which the coal was obtained by you that was applied on this contract, and file as Exhibit "C" to your deposition?

A. Yes.

Exhibit "C."

Q. 55. You say that probably various other concerns' coal was shipped on this contract, can you name others?

A. No, I could not say just which ones, I handled coal from three or four different branches.

Q. 56. From which ones?

A. From the Dixie Coal & Iron Company and A. J. Brannon, Dr. Stone, Dr. Hembree, Staub Coal Company, Tracy City Coal Company, coal I produced myself, and probably two or three more I don't just recall. I don't know whether but very little of this coal was shipped on the Federal Coal Company's contract or not but through this period of time I handled coal from these various people.

Q. 57. Where, with reference to Tracy City, was the mines of the Staub Coal Company?

A. They are about four and a half or five miles North of Tracy City, probably little northwest.

Q. 58. And where were the mines that Dr. Hembree was operating located?

A. Mr. Brannon, Dr. Hembree and Dr. Stone had little mines [fol. 98] all over the mountain.

Q. 59. Just tell us where such as you now have in your mind are located?

A. Commencing at Tracy City about three and a half miles or four miles of the town, and circuit.

Q. 60. Getting down to particularity, tell us where one is that you now have in mind, of Hembree's.

A. Dr. Hembree had one known as Laketown, and Stone also.

Q. 61. How far is that from Tracy City?

A. About a mile; Dr. Hembree had about three more within a mile, running kindly northeast from the Laketown mine, right around the brow of the hill on about what is known as "Seaming Young County." Then he had a mine over East from town on what is known as the "Way" place. He had another one in the same direction about a half mile from town what is known as the Boulz'n place. I can name them over till dark pretty nearly. These were little places opened up and hauled with wagons, lots of the coal had been left by the convicts fifty years ago.

Q. 62. Let's get the Brannon mines?

A. He had one mine, probably two, he may have had several openings not over a half mile northeast of the Laketown mines.

Q. 63. You are acquainted with the location of some mines Stone and others were interested in known as the Manuel Nulley 300 acre tract?

[fol. 99] A. I think so, that is the Morrell, head of the "M" mines hollow. I know Dr. Stone and his brother own a tract and the Sewanee Fuel Company operates it.

Q. 64. These small mines that you operated, Mr. Flanagan, are they remnants, little places where coal has been left, similar to the ones you have referred to, operated by Brannon, Hembree and Stone?

A. Two were, and one is a large hill, but it has not been operated very much.

Q. 65. Where is that large hill located?

A. About four and three-quarter miles Northwest of Tracy City.

Q. 66. Where were the mines of the Tracy City Coal Company located?

A. About ten or twelve miles northwest of Tracy City.

Q. 67. And about how near to the town of Coalmont?

A. About three and a half miles, little northwest.

Q. 68. Were they on the land that was known as the West end of the Tom Johnson Grant?

A. One mine is on the Johnson grant, it is probably within a mile and half of Coalmont. There is another strip of territory between it and the other mines, the other mines are over beyond that.

Q. 69. Is the Tracy Coal Company an individual partnership or corporation?

[fol. 100] A. Corporation.

Q. 70. Is it a Tennessee Corporation?

A. It is.

Q. 71. You have some connection with it also?

A. Yes.

Q. 72. What was your connection?

A. Last year I was General Manager.

Q. 73. You had charge of it and controlled the operations on the ground?

A. Not necessarily, our President, Mr. J. C. Beesley at that time was really acting President and Manager.

Q. 74. During this time you were operating this business of the Cumberland Coal Company, were you also giving actual attention to the running of the Tracy City Coal Company or was Mr. Beesley running it?

A. Mr. Beesley.

Q. 75. You had some stock in it?

A. Yes, sir.

Q. 76. Why does the contract you sue on here, Mr. Flanagan, refer to a release of the Tracy City Coal Company under a contract

of April first, 1920, between that Company and Chattanooga Coal Company?

A. The Tracy City Coal Company had a contract with the Chattanooga Coal Company which was reported to me was to be transferred to the Federal Coal Company, both by the Chattanooga Coal Company and the Federal Coal Company, and Mr. Thompson seemed to [fol. 101] be very anxious to make this contract for this coal, so I thought I might as well get the other contract cancelled in consideration of this one.

Q. 77. You say at the time this contract was made you sold to the Federal Coal Company quite a lot of coal at \$10.00 per ton?

A. Yes, sir.

Q. 78. About how much would you say?

A. I could not just say, but it was a pretty large shipment, must have been twenty-five or thirty railroad cars.

Q. 79. Twenty-five or thirty cars a day?

A. No, sir, from the 15th to the last of the month.

Q. 80. Did you mine that coal or was it coal you bought?

A. Part I mined myself and part I bought.

Q. 81. Bought it from these same people you bought the other from?

A. Yes, sir, outside the Staub people, don't think I bought any from them, if I bought it from them it was on open market.

Q. 82. Had you been selling coal to the Federal Coal Company before this time?

A. I think I had sold some to them. It strikes me I had been selling to them probably all the month.

Q. 83. Do you recall the price?

A. No, sir, I don't; it was not \$10.00; up until about the 15th [fol. 102] of August the price gradually grew to \$10.00, when it got to \$10.00 they wanted to make the contract, and when I begin to deliver coal on the contract, it was \$1.00 a ton under current prices and on the first of September coal begin to come down and they took it on the contract as long as coal was selling at the contract price.

Q. 84. They ceased to take it when it came under contract price?

A. Not just instantly, but when it came under quite a bit.

Q. 85. You said they took it as long as it was selling at the contract price, what do you mean?

A. As long as the open market was above or equal to the contract price they took it as they contracted for it, but in sight of fifteen days after the coal came under the contract price they didn't take the amount they had agreed to. They didn't in September, and I don't know just when it came down below \$9.00 but it was \$9.50 on the 15th of September.

Q. 86. It was \$9.50 at what time?

A. 15th of September, and I shipped them every pound on the contract that they were suppose to take out at that time while the market was above the contract.

Q. 87. In connection with the statement asked for in your cross-examination above, I will ask you to please also list the coal that you

[fol. 103] shipped to the Federal Coal Company about which you have testified, independent of shipments that were shipped under this contract, showing the source of the coal, the time of the shipment and the selling price?

A. Alright, sir.

Q. 88. Where does Mr. A. W. Campbell, County Court Clerk have his office?

A. In Tracy City.

Q. 89. And he has a Deputy in Tracy City also?

A. I suppose so. I inquired for the right man to get my license and I was referred to Mr. Roddy.

Q. 90. Does Mr. Roddy stay in the same office with Mr. Campbell?

A. No.

Q. 91. Where is Mr. Campbell's office?

A. Court House. He is not in his office regular, Mr. Roddy is always in his.

Q. 92. Mr. Roddy runs a store and is always in the store?

A. Yes, and is Justice of the Peace, and is two or three Deputies to the Clerks and has something to do with the Court proceedings.

Q. 93. And acts as Deputy to more or less of the Officers?

A. Yes, sir, and I think a mighty straight man too.

Q. 94. Mr. Flanagan, please look at that and see if you wrote that letter (handing witness letter)?

[fol. 104] A. Yes, sir, never had a reply from it though.

Q. 95. This letter bears date of April 12th, 1921, is that the correct date?

A. I suppose so.

Q. 96. It was written about the date it bears?

A. I think so.

Q. 97. Will you file this letter as Exhibit "D" to this your deposition?

A. Yes.

Exhibit "D."

Q. 98. Had you written the Federal Coal Company on this subject before the date of this letter?

A. I don't think so.

Q. 99. This was the first letter you wrote them on this subject?

A. I think so.

Q. 100. Please look at that letter and see whether or not you wrote that letter (handing witness another letter).

A. That is not pertaining to this. I recognize the signature, I don't remember just writing the letter.

Q. 101. Do you now, after looking at it, recognize it and admit it as being a genuine letter written to the Federal Coal Company about the date it bears?

A. Yes, sir.

Q. 102. Will you please file that as Exhibit "E" to this, your deposition?

A. Yes, sir.

Exhibit "E."

Re-examination.

By J. J. Lynch:

[fol. 105] Q. 1. Does this letter of September 13th, 1920 have any reference to the contract in question?

A. No, sir, it shows on the face of it it does not.

Q. 2. I will ask you whether or not in writing this letter of April 12th, 1921, in fixing the amount of your damage, you were under the apprehension that you had to calculate the damage on the coal that should have been shipped in each month separately?

A. Yes.

Mr. Moore: I except to the foregoing question because it is incompetent and irrelevant.

Q. 3. I will ask you whether or not that was the basis of calculating the damages you set out in that letter?

A. Yes, sir.

Q. 4. I will ask you, Mr. Flanagan, what was the average amount of coal contained in the ~~cars~~ shipped by you under this contract?

Mr. Moore: We except to the foregoing as original testimony.

Mr. Lynch: Counsel for complainant states this is a question he overlooked.

A. The average is 54.53 tons.

And further this deponent saith not.

Sworn to before me this first day of July 1921. B. M. Gorman.

[fol. 106] EXHIBIT "B" TO DEPOSITION OF E. R. THOMPSON

Federal Coal Company

Chattanooga Tenn.

Order No. 9877

To John D. Flanagan,
At Tracy City, Tenn.:

Nov. 5, 1920.

Please make shipment for our account as follows:

To Quartermaster, Key West Barracks, at Key West, Fla. Seaboard Air Line Ry. delivery.

When: One car every other day. Shipments must be completed within ten weeks from date of order.

Quantity & Description: 1,500 tons ROM.

Price: \$8.50 per ton.

Show us as shippers and send us notice of shipment and Bill of Lading as soon as possible.

Yours very truly, Federal Coal Company, By John Crosniak.

EXHIBIT "A" TO DEPOSITION E. R. THOMPSON

Date	Initial & car	Tons	Price	Amount	Sold to—	Price	Amount
9/ 1/20, Frisco	85250.....	59.90	9.00	539.10	Logan Coal & Supply Co.....	9.75	584.03
2 N&C	32850.....	31.80	.....	.....	"	.....	.....
	32557.....	30.80	.....	.....	"	.....	.....
	35937.....	43.35	"	953.55	"	"	1,033.01
4 PRR	294924.....	48.35	"	435.15	"	"	471.31
3 SOU	98240.....	50.90	"	458.10	"	"	496.27
7 I&N	62908.....	47.00	"	423.00	"	"	458.25
SLSF	80407.....	56.85	"	.....	"	"	554.29
[fol. 107]							
8 I&N	6094.....	44.90	9.00	915.75	Logan Coal & Sup. Co.....	9.75	437.77
NYC	315376.....	44.95	"	.....	"	"	438.36
	346890.....	40.65	"	770.40	"	"	396.34
9 KCS&FM	81677.....	57.25	"	.....	"	"	558.18
CCO	42792.....	56.95	"	1,027.80	"	"	555.26
10 CCO	42272.....	54.45	"	.....	"	"	530.89
LV	21832.....	55.95	"	903.60	"	"	545.51
16 I&N	74151.....	58.60	"	.....	Reliable Lady.....	9.25	542.05
CBQ	17723.....	60.25	"	.....	National Pap.....	"	557.31
ABA	59040.....	61.35	"	1,621.80	Stocks Coal Co.....	9.00	552.15
17 SOU	170539.....	61.10	"	.....	"	"	549.90
PL	721674.....	78.60	"	.....	Kimball House.....	9.50	746.70
CEI	81423.....	48.90	"	1,097.40	Stocks Coal Co.....	9.00	440.10
18 N&C	40071.....	57.50	"	.....	"	"	.....
P&R	72934.....	60.10	"	.....	"	"	.....
N&C	40110.....	56.80	"	1,569.60	"	"	1,569.60
20 SOU	181395.....	62.70	"	.....	Godley & Griffin.....	"	.....
	196574.....	58.05	"	.....	"	"	1,086.75
21 SOU	186375.....	62.90	"	.....	"	"	.....
CCO	42705.....	57.40	"	1,082.70	"	"	1,082.70
23 I&N	70063.....	58.90	"	.....	"	"	.....
CCO	20710.....	54.70	"	1,022.40	Cedartown Cotton Export Co...	9.50	1,079.20

EXHIBIT "A" TO DEPOSITION OF E. R. THOMPSON—Continued

Date	Initial & car	Tons	Price	Amount	Sold to—	Price	Amount
24	PRR	73.80	9.00	664.20	City of Douglasville, Ga.....	9.50	701.10
9/24/20.	IC	58.20	"	.....	Godley & Griffin.....	9.00	.....
	CB&Q	55.95	"	.....	"	"	1,534.95
	ACL	56.40	"	1,534.95	"	"	532.80
25	B&O	57.60	"	.....	Natl. Pap. Co.....	9.25	540.90
	IC	60.10	"	1,059.30	Godley & Griff.....	9.00	.....
10/ 5/20.	Erle	55.60	"	.....	Hibbler-Barnes	7.75	.....
	PRR	49.85	"	.....	"	"	.....
	COFG	53.10	"	.....	"	"	.....
	L&N	57.95	"	1,948.50	"	"	.....
6	C&O	60.10	"	.....	"	"	.....
[fol. 108]							
10/ 6/20.	P&L	77.55	9.00	1,238.85	Hibbler-Barnes	7.75	2,944.76
	C&O	57.50	"	517.50	"	"	445.63
11/ 4/20.	K&M	47.25	8.50	401.62	Emmons Coal Mining Co.....	9.00	887.40
	COFG	51.45	"	437.33	"	"	478.80
8	CMSTP	53.20	"	452.20	"	"	427.95
10	N&C	47.55	"	404.17	"	"	494.55
12	MC	54.95	"	467.07	"	"	477.00
15	B&O	53.00	"	450.50	"	"	486.00
16	N&C	54.00	"	459.00	"	"	462.60
18	N&C	51.40	"	436.90	"	"	450.45
20	NYNH&H	50.05	"	425.43	"	"	499.95
22	I&N	55.55	"	472.18	"	"	477.00
24	C&NW	53.00	"	450.50	"	"	477.45
26	HV	53.05	"	450.92	"	"	495.00
27	CB&Q	55.00	"	467.50	"	"	476.10
30	SOU	52.90	"	449.45	"	"	471.60
12/ 2/20.	IC	52.40	"	445.40	Emmons Coal Co. Mining Co....	"	

4	SP	54513.....	53.00	"	450.50	..	..	..	477.00
6	CIL	30149.....	53.05	"	450.92	..	..	..	477.45
7	LNE	3508.....	51.90	"	441.15	..	..	..	..
11	N&C	40024.....	55.00	"	472.00	..	..	..	967.50
11	SOU	187484.....	50.05	"	425.42	..	..	..	450.45
14	SOU	182713.....	52.10	"	442.85	..	..	..	..
16	Erle	31312.....	52.70	"	447.95	..	..	..	..
20	COFG	20029.....	48.00	"	413.10	..	..	..	..
22	SOU	188608.....	53.50	"	454.75	..	..	..	1,862.10
24	CTH&SE	11001.....	49.75	"	422.87	..	..	..	..
27	HV	128488.....	47.05	"	405.02	..	..	..	..
28	C&A	40146.....	49.55	"	421.17	..	..	..	..
29	C&NW	84879.....	51.95	"	441.57	..	..	..	..
30	L&N	71833.....	55.10	"	408.35	..	..	..	2,286.00
31	COFG	20244.....	54.55	"	463.08	..	..	..	490.95
			3,959.40		34,852.27				35,508.48

[fol. 109] EXHIBIT "C" TO DEPOSITION E. R. THOMPSON

The following is a list of cars of coal received by the Federal Coal Company from the Cumberland Mountain Coal Company in addition to those as shown in Exhibit "A" to deposition of Mr. E. R. Thompson:

Date	Initial & car	Tons	Price	Amount
Aug. 17/20.	B&O 126546.....	57.30	10.00	573.00
Aug. 17/20.	N&W 81423.....	54.20	"	542.00
Aug. 19/20.	N&C 32371.....	34.15	"	341.50
	NYC 306935.....	49.10	"	491.00
Aug. 20/20.	N&C 35790.....	47.50	"	.....
	40083.....	57.60	"	.....
	SOU 190232.....	63.60	"	.....
	C&A 23972.....	63.65	"	.....
	L&N 33760.....	62.70	"	2,950.50
Aug. 21/20.	CI&L 25059.....	58.10	"	.....
	MV 2748.....	44.15	"	1,022.50
Aug. 23/20.	N&C 42082.....	61.45	"	.....
	IC 116618.....	60.25	"	.....
	N&C 32335.....	33.00	"	.....
	N&C 45000.....	41.00	"	1,957.00
Aug. 24/20	35680.....	47.40	"	.....
	32504.....	34.10	"	.....
	32547.....	31.40	"	.....
	32801.....	31.25	"	.....
	L&N 70705.....	46.90	"	1,910.50
	MP 63900.....	44.05	"	.....
	SAL 33259.....	43.65	"	.....
	VGN 17949.....	53.25	"	.....
	SOU 189095.....	60.55	"	.....
	B&O 142090.....	50.75	"	.....
	N&C 32313.....	29.35	"	2,816.00
Aug. 28/20.	PLE 35043.....	46.40	"	.....
[fol. 110]				
Aug. 28/20.	SOU 188847.....	58.45	10.00	1,048.50
	L&N 71942.....	56.25	"	.....
Aug. 30/20.	PMcK&Y 63162.....	81.70	"	1,379.50
	NYC 32364.....	44.75	"	425.13
Sept. 2/20.	N&C 32361.....	30.50	9.50	289.75
Sept. 2/20.	SOU 181754.....	60.00	"	570.00
	PS 16805.....	60.05	"	570.47
		1,698.50		16,887.35

The following is a list of cars of coal received by the Federal Coal Company from John D. Flanagan Coal Company during period May 1st to September 1st, 1920.

Date	Initial & car	Tons	Price	Amount
May 26/20.	N&C 35748.....	44.95	6.25	280.94
May 28/20.	SL&SF 70138.....	43.55	"	272.19
	N&C 32467.....	31.35	6.50	203.78
May 29/20.	N&C 35543.....	46.70	"	303.55
	IC 88962.....	42.95	"	279.18
		211.50		1,339.61

The following is a list of cars of coal received by the Federal Coal Company from John D. Flanagan, during period May 1st to September 1st, 1920.

Date	Initial & car	Tons	Price	Amount
May 27/20.	PL 859357.....	36.75	6.25	.....
	NYC 303086.....	45.90	"	.....
May 27/20.	MC 5505.....	41.65	"	776.88
Jul. 8/20.	N&C 32799.....	29.00	8.75n	253.75
		153.30		1,030.63

The following is a list of cars of coal received by the Federal Coal Company from the Cumberland Coal Co., during period May 1st to September 1st, 1920.

Date	Initial & car	Tons	Price	Amount
Jul. 7/20.	W&LE 72764.....	65.80	8.75	575.75

[fol. 111] Testimony resumed January 24th, 1922.

Mr. FLANAGAN introduced for further cross-examination.

Cross-examination.

By C. C. Moore:

Q. 1. Mr. Flanagan you were examined as a witness in this case about July 1st, 1921, were you not?

A. Yes, sir.

Q. 2. At that time, Question 24 of your direct examination asks you to procure from your files and file as a part of your testimony in sequential order Numbered 1, 2, 3, etc., shipping instructions, if any, that you had and received from the Federal Coal Company for the shipment of coal on this contract. Have you filed such in- [fol. 112] structions in compliance with that request?

A. No, sir.

Q. 3. Have you searched your files to see if you had such instructions?

A. No, sir, I have not.

Q. 4. Where are your files kept?

A. Tracy City.

Q. 5. Where is your office?

A. Tracy City.

Q. 6. In other words they are kept in your office at Tracy City?

A. Yes, I am sure I have some, but I am pretty sure that they were not all kept.

Q. 7. You mean that you destroyed some?

A. Yes, we didn't really consider these important records, and we didn't retain the shipping instructions from any of the coal people, we just treated them as instructions to ship coal and when the order was filled we felt like we were through.

Q. 8. At what stage would you destroy these; I mean at what time, when they would first arrive?

A. After they were filled.

Q. 9. In other words as soon as you had made shipment of the coal?

A. Yes, practically all of them might have been kept but I am certain they were not all kept because we didn't consider they were of any importance whatever after they had fulfilled their mission.

Q. 10. Would you destroy them before you collected for the coal you shipped?

A. Yes, that was just instructions as to where to ship the coal [fol. 113] then we sent bills-of-lading and invoices to the people whom we sold coal to by which we settled.

Q. 11. They were not considered important and consequently thrown aside or destroyed?

A. Yes, sir.

Q. 12. Were they taken out of the files and destroyed or carelessly thrown around?

A. I think so, yes, sir; probably some of them destroyed straight out, others in that way. As a matter of fact you know the Brokers are the only people who use the written forms and written instructions; if you go to buy a car of coal ordinarily you would give instructions over the telephone; it is not considered important and your invoices and bills-of-lading are what you settle by.

Q. 13. And did you receive instructions over the phone that way?

A. Not from these people.

Q. 14. I mean from anybody?

A. Yes, sir.

Q. 15. The Brokers, you say, had a custom of using these forms?

A. Yes, and bills of their own; as various orders came over the telephone we would get the written instructions next day.

Q. 16. As soon as you made a record or a memoranda of the destination of the car, the instruction was thrown aside and of no further value, and that was the only use it served at all?

A. Yes.

Q. 17. When a Broker had made a sale to some particular customer and wanted the coal to go to that particular customer direct from [fol. 114] you he would send you these shipping instructions to tell you where it was to go to?

A. Yes, sir.

Q. 18. Now, in this instance, did you receive from the Federal Coal Company some instructions on a printed form, apparently they had prepared for use in giving instructions in that way, in the shipment of this coal?

A. I did have all of them.

Q. 19. You never received shipping instructions in any other manner except in such printed forms?

A. I don't think so.

Q. 20. Did you ever receive instructions by telephone or telegram?

A. I might have, but if I did it was then later verified by the form shipping order.

Q. 21. For instance I show you this copy of telegram and ask you whether or not this refreshes your memory as to receiving such shipping instructions?

A. I don't recall that just in my mind, but that may be true, but we received orders similar to that from these people and others,—telephone orders, then they were always varify- by the written shipping orders.

Q. 22. Will you please file this telegram, dated September 20, 1920, addressed to John D. Flanagan, Tracy City, and reading: Ship to Godley & Griffin, Savannah, Georgia, until advised, signed Federal Coal Co., as Exhibit "F" to your cross-examination?

A. Yes, sir.

Exhibit "F."

Q. 23. In the billing of coal, Mr. Flanagan, was it your custom during [fol. 115] 1920 to preserve duplicate invoices in your files for coal you sold?

A. Yes.

Q. 24. Have you still preserved those files?

A. I think so.

Q. 25. How was your coal billed that you sold in which you were personally interested?

A. Cumberland Mountain Coal Co.

Q. 26. Did you bill any in any other manner?

A. Yes, Companies I was interested in.

Q. 27. I mean the coal that was yours?

A. I don't know.

Q. 28. Didn't you sell coal and bill it in the name of John D. Flanagan during that period?

A. I don't think I did; I remember back along in that time, sometimes I shipped quite a bit of coal under the name of John D. Flanagan Coal Company, but I don't think I did in my individual name.

Q. 29. You did use the name of John D. Flanagan Coal Company?

A. Yes, I think that was used prior to the beginning of this contract.

Q. 30. You also used the name of the Cumberland Coal Company?

A. Yes.

Q. 31. You had printed invoices for John D. Flanagan Coal Company?

A. I think so.

Q. 32. Didn't you also have and use printed invoices of the Cumberland Coal Company?

A. I think so.

Q. 33. And about what period of time were you using these invoices—each of them?

[fol. 116] A. I think I used the John D. Flanagan Coal Company prior to the time I used the Cumberland Coal Company.

Q. 34. During what time did you use the Cumberland Coal Company?

A. Right after I used the John D. Flanagan Coal Company.

Q. 35. Then you succeeded to what name?

A. Cumberland Mountain Coal Company.

Q. 36. Why these changes in name?

A. Well, I just preferred to change the name from John D. Flanagan, and I used for a few days the name of the Cumberland Coal Company and I found out there was a Cumberland Coal Company in Chattanooga, and it got some billing mixed up and I never used that name but a few days and then I inserted the word "Mountain."

Q. 37. The Cumberland Mountain Coal Company was begun after the Cumberland Coal Company ceased?

A. Yes.

Q. 38. And the Cumberland Coal Company was begun after John D. Flanagan Coal Company ceased?

A. Yes, sir.

Q. 39. Do you recall when you ceased using the name of John D. Flanagan Coal Company?

A. No, sir.

Q. 30. It was in the year 1920, was it not?

A. Probably so.

Q. 31. Do you recall when you used the name Cumberland Coal Company?

A. It was in 1920 I think, I only used it not exceeding one week.

Q. 32. That was, you think, about one week, as long as you used that?

[fol. 117] A. Yes.

Q. 33. What, if anything, causes you to remember that it was just for about one week; is there anything that refreshes your memory on that?

A. It is the fact, as I have just explained, that I just begin to ship coal under the name of the Cumberland Coal Company, and I sold Mr. Busbee of the U. S. Fuel Corporation some coal and they got the invoices mixed up because they were buying coal from the Cumberland Coal Company of Chattanooga—I didn't know there was such a Coal Company in Chattanooga at the time, so they telephoned me about it and I immediately inserted the word "Mountain" as it was only a trade name any way.

Q. 34. And when you learned of that fact and ceased using the Cumberland Coal Company name and begun using the Cumberland Mountain Coal Company, you never used Cumberland Coal Company any more?

A. I just inserted the word "Mountain."

Q. 35. And after you inserted the word "Mountain" then you ceased entirely to use the name Cumberland Coal Company?

A. Yes, I ceased to ship without using the word "Mountain."

Q. 36. Please look to this invoice and say if that is one of the invoices that you used as the Cumberland Coal Company under which you made shipment, and one of your invoices sent out by your office?

A. Yes, sir, looks like it.

Q. 37. I will ask you to please file this original invoice dated July 7th, 1920, billing the Federal Coal Company of Chattanooga

[fol. 118] with coal bought of the Cumberland Coal Company, a car of coal, W. L. E. No. 72764, weight 1316, tons 65.80, kind of coal, R. M., Rate 8.75, amount 575.75, as Exhibit "G" to your cross-examination?

A. Yes, sir.

Exhibit "G."

Q. 38. In giving your former testimony you were asked concerning your license as a coal dealer and whether or not the license which you filed as Exhibit "A" was the only license which you obtained, and you at that time did not remember but promised to look, and if you could find any further license to file it. I will ask you whether or not you have filed any further license?

A. No, sir.

Q. 39. Mr. Flanagan, in your former deposition, on cross-examination, you were asked to make up and file a statement as to coal shipped and to show on that statement the source from which the coal was obtained by you, which was applied on that contract, as Exhibit "C" to your deposition. Have you prepared such a statement?

A. No, sir.

Q. 40. Why have you not prepared that?

A. I have been expecting to, and we have had so many days set for this continuance of the case and put off from time to time, and got me kindly dilatory. I will get it up though right away.

Q. 41. How soon do you think you can get that?

A. By the first of the week.

Q. 42. Mr. Flanagan, in your former cross-examination you were [fol. 119] also asked to make a list of coal that you had shipped to the Federal Coal Co. and the time and selling price; you have not made up that list have you?

A. No, but I will make them both right away.

Q. 43. In your former cross-examination, Mr. Flanagan, you testified that for the purpose of this contract you had bought some coal from the Staub Coal Co. Will you tell us about when you contracted with the Staub Coal Co. for that coal?

A. I can't remember the exact date but after going into the matter more thoroughly after my testimony here,—at that time I had in mind a contract—I find that was a mining lease, I had the coal leased from them.

Q. 44. You said, I believe, that the Staub Coal Company was suing you for the breach of that contract?

A. I said they were threatening suit, didn't I?

Q. 45. Have they not, in fact, sued you?

A. No, sir.

Q. 46. Now, what kind of a lease was that that you mention you now discover instead of the sale contract?

A. It was a straight lease for coal.

Q. 47. When was that contract with the Staub Coal Company entered into?

A. I don't remember the exact date; I have the lease with me.

Q. 48. Please refer to it and give us the date.

A. 24th day of July, 1920.

Q. 49. Will you file a copy of the paper that you have referred to as an Exhibit to your cross-examination, calling same Exhibit "H"? [fol. 120] A. Yes, sir.

Exhibit "H."

Q. 50. Was the Staub Coal Company threatening to bring suit against you for the breach of this contract of July 24th?

A. I have with me a mining contract made later. (He here hands contract to Counsel).

Q. 51. Is that all the answer you want to make to the preceding question, as to whether they were threatening to sue you?

A. I think so.

Q. 52. They were threatening to sue you because you had made another contract with them satisfying the first?

A. Yes, and they were threatening to sue on these contracts.

Q. 53. They were charging that you had not carried out your contracts with them?

A. Yes.

Q. 54. Had you not, in fact, mined your coal under this contract?

A. The second contract shifted the burden from their shoulders. I had not been able to accept it under the second contract, the coal they mined. This is a lease and this is a mining contract. I leased the property from them and then turned around and contracted back to them, getting the coal out of the mines putting it on the Railroad cars. They became miners in the second contract.

Q. 55. What interest did you have in the Staub Coal Company at the time?

A. None at all.

Q. 56. When did you acquire an interest in the Staub Coal Co.? [fol. 121] A. Months after that.

Q. 57. Was the Staub Coal Company the owner of the land described here as the "Farmer's Camp Hill", etc.?

A. I think probably they were the leasees, they had it leased.

Q. 58. Was any mining actually done under either of these contracts?

A. Yes, sir.

Q. 59. Was there a developed mine on the land at the time, that is included in this lease, or was there no other mine that is excepted from the lease?

A. There was one on it that is not excepted.

Q. 60. The mining contract you mention, I will ask you—in order to make the story complete—that you attach a copy of it to your deposition as Exhibit "I"?

A. I will.

Exhibit "I."

Q. 61. You don't recall when you acquired an interest in the Staub Coal Company?

A. No, sir, I don't exactly.

Q. 62. And you don't know whether it is the owner of the mines or merely the owner of a lease?

A. I think it is the owner of the lease.

Q. 63. You are not certain that is true?

A. I am pretty sure it is true.

Q. 64. Was the Staub Coal Company a Corporation?

A. Yes.

Q. 65. How much was its capital stock?

A. I think \$90,000.00.

Q. 66. Did you buy some of the stock?

A. Later, yes, sir, a very small amount. I think about \$1,000.00.

[fol. 122] Q. 67. Was the threatened lawsuit never brought?

A. It has not been brought.

Q. 68. Why?

A. I don't know, sir.

Q. 69. Who are the officers of the Staub Coal Company now, are they the same or different?

A. They are some different.

Q. 70. Is Mr. Werner still the president?

A. Yes.

Q. 71. He was the Werner who testified in your behalf heretofore?

A. That was his son, who I think was General Manager, Superintendent or General Manager.

Q. 72. Have you entered into any contract with the Staub Coal Company by which they are to share in your recovery in this case, in case you get one?

A. No, sir.

Q. 73. Never entered into any kind of a contract with reference to this contract in any way?

A. No, sir.

Q. 74. Have you made such a contract with any one else for the benefit of the Staub Coal Company?

A. No, sir, have not made any contracts at all.

Q. 75. Now in your former testimony you stated you had a contract with the Staub Coal Company for 5,000 tons of which you had taken apart. How did you arrive at the figures of 5,000 tons?

A. Well, I did have another contract with them besides this lease.

[fol. 123] Q. 76. When was that?

A. Well, about this time.

Q. 77. Where is it?

A. I don't know if it is here or not.

Q. 78. Will you produce this other contract that you refer to?

A. Yes, sir.

Q. 79. Then, is this contract dated July 15th, 1920, the one to which you refer in your former testimony?

A. Yes, as a matter of fact I think I was referring to both of them, the way I remember it now.

Q. 80. How many mines did the Staub Coal Company have?

A. They must have had between five and fifteen.

Q. 81. In operation during that time?

A. Yes, sir.

Q. 82. Were they operating them themselves or leasing them all?

A. They were operating, except the one they leased.

Q. 83. Approximately what tonnage would be produced of the coal mines of the Staub Coal Company?

A. Including the one I leased from them?

Q. 84. No, omitting the one you leased.

A. I expect 150, probably 200 tons a day.

Q. 85. Four to five cars per day?

A. Yes, sir.

Q. 86. Will you please file this contract dated July 15th, 1920 as an Exhibit to your deposition, marking it Exhibit "J"?

A. Yes, sir.

Exhibit "J."

Q. 87. In your former testimony you mentioned having purchased coal from Dr. Hembree, was that by contract?

A. I purchased by contract and on the open market too.

[fol. 124] Q. 88. About what time was the contract entered into?

A. The contract was entered into quite awhile before this one, I don't just remember the date, a few months before this contract.

Q. 89. Have you that contract present also?

A. I don't think I have.

Q. 90. Will you please file as Exhibit "K" to your deposition a copy of that contract, that is, the Hembree contract?

A. Yes.

"K."

Q. 91. You say that in addition to the contract that you bought other coal from him. Have you any records of these subsequent purchases?

A. I think probably I have.

Q. 92. In what form?

A. It would be on the general book, the coal shipment book.

Q. 93. Would there be a written memoranda of the purchase made at the time, or reasonably close to the time of the purchase obtained by you?

A. I don't really think so, of course I could check from my coal book; then I do have a shipping order, but of course the shipping order does not show from whom it comes. We keep one big book that we keep all coal from whom bought and to whom shipped.

Q. 94. What is the shipping order to which you refer?

A. A duplicate order to whom I shipped the order.

Q. 95. Who would issue that?

A. We make those in our office.

Q. 96. Just this memoranda of the parties to whom you are shipping coal?

A. Yes.

[fol. 125] Q. 97. The same information would be entered on this shipping ledger, I presume?

A. Yes, the ledger shows from whom it comes while the shipping order does not.

Q. 98. What does appear on that shipping ledger?

A. All coal we produce or buy or handle.

Q. 99. What information with reference to that coal appears there?

A. It all appears there.

Q. 100. That is, the date of the shipment would appear, would it?

A. Yes.

Q. 101. And the person to whom shipped?

A. Yes.

Q. 102. The person from whom purchased?

A. Yes.

Q. 103. And the car numbers I presume would appear?

A. Yes.

Q. 104. The weight would appear?

A. Yes.

Q. 105. And the price that you paid for the coal would appear?

A. Yes.

Q. 106. And the price you received at the sale of the coal would likely appear?

A. Yes.

Q. 107. All that information would be on that book?

A. Yes.

Q. 108. Now, do you keep more than one such book in your office at the same time?

A. Yes, sir.

Q. 109. How many?

[fol. 126] A. I don't just remember. I keep a number of different books, different records and different things.

Q. 110. You keep a number of these different shipping ledgers?

A. Yes.

Q. 111. Why did you keep a number of different ones at the same time?

A. There were different people. I was representing several different concerns at the same time?

Q. 112. What different concerns?

A. Tracy City Coal Co., Campbell Branch Coal Co., Cumberland Mountain Coal Company,—that's all.

Q. 113. Who were the officers of the Campbell Branch Coal Company?

A. I don't remember; at that time I was President of it.

Q. 114. It was a Corporation?

A. Yes, sir.

Q. 115. You were not the exclusive owner at that time?

A. No, sir; I was the only one that had any money invested. I didn't own 100% of the stock, there was some of the stock I gave to different people, small amounts, they were my Directors; I was the only one that had any money invested in it.

Q. 116. Did the Campbell Branch Coal Co. buy and sell coal also?

A. No, sir.

Q. 117. It simply was a mining concern?

A. Yes, sir.

Q. 118. It operated mines only?

A. Yes, sir, it really might have sold coal too but it didn't buy [fol. 127] and sell.

Q. 119. In other words it sold its own coal that it mined, but didn't buy coal for the purpose of selling?

A. Yes, sir.

Q. 120. Would this shipping ledger that you mention indicate the fact of your having bought spot coal from Hembree, and the approximate date you bought the coal?

A. Yes, sir.

Q. 121. How many mines did the Campbell Branch Coal Company operate?

A. Well, five or six.

Q. 122. That was your operating Company that you used, presumably the mines in which you were interested?

A. Yes, sir.

Q. 123. This Cumberland Mountain Coal Company was your brokerage trade name that you used for handling coal you bought and sold?

A. Yes, sir, and for operating too.

Q. 124. What mine did it operate?

A. It operated the "Q" mines or Farmer's Camp.

Q. 125. You mean the Staub Coal Mines?

A. Yes, sir, and several wagon mines.

Q. 126. Now, the contract you have filed here shows that that is mined in your individual name and not in this Cumberland Mountain Coal Co. name?

A. It is all the same thing.

Q. 127. Did you operate any mine in your individual name?

A. No, sir, I think that the operations were all in the name of the Cumberland Mountain Coal Co.

[fol. 128] Q. 128. And the Campbell Branch?

A. Yes, sir.

Q. 129. Didn't the Tracy City Coal Co. operate at that time?

A. Not at that time.

Q. 130. What was it doing, just buying and selling coal?

A. No, sir, the Campbell Branch was operating the Tracy City Coal Company's property.

Q. 131. The Campbell Branch was a leasee of the Tracy City property?

A. Yes, sir.

Q. 132. Did you buy coal from any other concern, except the contract, for the purpose of this Federal Coal Company contract?

A. I don't remember, it has been a long time ago and I was handling a lot of contracts.

Q. 133. You were selling coal to many other people besides the Federal Coal Company, were you not?

A. Yes.

Q. 134. In your former testimony you mention of having bought some coal of the Dixie Coal & Iron Co. Did you have any contract with the Dixie Coal & Iron Company?

A. No, sir.

Q. 135. Was that just spot coal that you bought from time to time?

A. Yes.

Q. 136. You also testified to having bought from A. J. Brannon, was that by contract?

A. Spot coal.

Q. 137. You also mentioned Dr. Stone, how was that?

A. Spot coal.

[fol. 129] Q. 138. Also you mentioned the Tracy City Coal Company, how was that bought?

A. I don't just remember, it seems to me like I had a contract with them.

Q. 139. When was that contract entered into?

A. I don't know, I don't know whether that contract covered any of this period of time or prior to this.

Q. 140. If they were not operating at this period of time were they trading in coal at this time?

A. Yes, sir, it was this way the Campbell Branch Coal Company had the mines leased on a royalty basis of 35¢ on a selling price of \$2.90, and the Tracy City Coal Company sold some coal and the Campbell Branch sold some; Tracy City would sell a car of coal and turn over the money to the Campbell Branch Coal Company, less their commissions whatever the selling price might be. When the Campbell Branch Coal Company sold the coal they paid to the Tracy City Coal Co. their commission according to the selling price of the coal whatever it might be.

Q. 141. You mean that the Campbell Branch Coal Company had to pay a commission of 35 cents per ton?

A. The 35 cents per ton was based on a selling price of \$2.90; if it was lower the royalties would be as 35 cents to \$2.90; if the selling price was higher, it *fluxiated* the same way. The Campbell Branch Coal Company actually produced the coal and either one sold it.

Q. 142. Contracts by either one was recognized by the other because they were both interested in each contract?

[fol. 130] A. Yes, sir.

Q. 143. You were the Vice-President and General Manager of the Tracy City Coal Company at that time?

A. Yes, sir.

Q. 144. Had you at that time acquired the stock of the Tracy City Coal Company?

A. Not at that time, the majority stock.

Q. 145. About when was it you acquired the majority stock of the Tracy Coal Company?

A. I think in February 1921.

Q. 146. Previous to acquiring that stock about what had been your stock interest?

A. It had been about, I think, 35%.

Q. 147. And after you acquired Mr. Beasley's stock what was it, in February of this year you mention?

A. Last year—I think it was eighty some odd per cent.

Q. 148. That is what it is at this time?

A. Yes, sir.

Q. 149. Is Mr. Werner interested in the Tracy City Coal Company also?

A. No, sir.

Q. 150. In reference to this shipping ledger you have referred to, or rather the several shipping ledgers, did you have one for the John D. Flanagan Coal Company exclusively for its shipments?

A. I don't know, I rather think it was all on the same ledger.

Q. 151. Were there others at that time?

[fol. 131] A. I don't just remember.

Q. 152. How about the Cumberland Coal Company, when it was functioning?

A. I don't remember about the details of all those books, it has been so long ago and so many changes, and changes so fast, I could not tell from memory. I couldn't straighten it out in my mind.

Q. 153. You don't recall then, whether or not, when John D. Flanagan Coal Company ceased shipments and the Cumberland Coal Company begin shipments you used a different book or continued the same book?

A. No, sir.

Q. 154. Do you know whether your records would show when those names were discontinued and the other begun?

A. I think so.

Q. 155. In what way would it indicate that?

A. I think it would indicate by using the name.

Q. 156. Showing the Flanagan Coal Co. as shipper, or the Cumberland Coal Company as shipper, or the Cumberland Mountain Coal Company as shipper as the case might be?

A. Yes.

Q. 157. Did you have a license in the name of John D. Flanagan Coal Co. in order to do business?

A. No, sir.

Q. 158. And is the license which you filed as Exhibit "A" the only license you had at all in connection with your selling business?

A. Yes, sir.

Q. 159. Will you please file as Exhibit "L" to your deposition a [fol. 132] transcript of this ledger that you have referred to, the shipping ledger covering the shipments by the Flanagan Coal Co., if any, by the Cumberland Coal Co., if any, and the Cumberland Mountain Coal Company, if any, from the period of June 1st to November 1st, 1920?

A. I will.

Exhibit "L."

Mr. Moore: If it is a loose leaf ledger and you want to turn them in that will be all right.

Q. 160. When you were making the contract that you sued on, Mr. Flanagan, and negotiating for the cancellation and release of the liabilities of the Tracy City Coal Company, why didn't you take that contract in the name of the Tracy City Coal Company instead of your own individual name?

A. Well, I don't just know, seems like at that time, I just preferred it this way.

Q. 161. Can you think of any reason why you preferred it this way?

A. No, I can't.

Q. 162. Was the contract for the benefit of the Tracy City Coal Co., the profit you made under it, if any?

A. No, sir.

Q. 163. You intended then the profits, if any, or the losses, if any, to be individual, to yourself?

A. Yes, sir.

Q. 164. Was the Tracy City Coal Co. paying you a salary, as its President and General Manager during that time?

[fol. 133] A. No, sir.

Q. 165. How were you compensated for your services by the Tracy City Coal Co.?

A. I was not.

Q. 166. You were the chief officer?

A. Mr. Beasley was the active officer at that time, as President, he was actively handling the contracts.

Q. 167. Mr. Beasley resided at Tracy City at that time?

A. No.

Q. 168. Where did he reside?

A. Murfreesboro.

Q. 169. Where were the offices of the Tracy City Coal Company at that time?

A. They really had an office at both places.

Q. 170. You spoke of their shipping records, etc.

A. Yes, sir.

Q. 171. They were in the same office you occupied?

A. Yes, they were, and there were records in the other office; there were records in both offices.

Q. 172. You were the man in charge of the Tracy City Coal Co. at Tracy City?

A. Yes.

Q. 173. And in Grundy County, Tenn.?

A. Yes, sir.

Q. 174. Was the Tracy City Coal Company operating mines?

A. No, sir.

Q. 175. Had they been?

A. Yes, sir.

Q. 176. They were, however, as you say, selling coal?

A. Yes.

[fol. 134] Q. 177. Who was selling that coal when it was sold by Tracy City Coal Co.?

A. Mr. Beasley always passed on it.

Q. 178. You negotiated the sales, did you not?

A. Yes, sir, negotiated them all.

Q. 179. Did the Tracy City Coal Co. buy any coal otherwise than under this arrangement with the Campbell Branch as referred to?

A. No.

Redirect examination.

By Judge J. J. Lynch:

Q. 1. Mr. Flanagan, you were asked about the Staub Coal Company claim for damage. I will ask you whether or not you requested the officers of that Company to delay any action for damages for the breach of your contract with them, and agreed as soon as this litigation was ended you would adjust or settle their claim for damages?

A. Yes, sir.

Re-recross-examination.

By C. C. Moore:

Q. 1. Do you now think that their suit is delayed because of this agreement you have mentioned?

A. Yes, sir.

Q. 2. And that now, you think, is the reason for the same?

A. Yes, sir.

The further taking of this deposition continued, pending the filing of exhibits called for in this and previous depositions.

[fol. 135] Next Witness, E. R. THOMPSON, introduced for cross-examination, deposed as follows:

Cross-examination.

By C. C. Moore:

Q. 1. Mr. Thompson, was your deposition taken by the complainant in this case about July 1st of last year?

A. Yes, sir.

Q. 2. Mr. Thompson, I find in your former testimony you were asked to make up and file as Exhibit "A" a statement showing the amount of coal received and the dates received, that is, received from the complainant, and to whom it was shipped. Have you made up such a statement?

A. No, sir.

Q. 3. How soon can you get up that statement, Mr. Thompson?

A. It's just a question of getting at it, like Mr. Flanagan I have been busy and got a little dilatory.

Q. 4. Will you kindly get busy and let us have the benefit of that statement?

A. Yes, sir.

Q. 5. In the making of that statement I will ask you to include in addition to the information asked for, also the price realized on each shipment by your Company when it was sold?

A. I will do that.

Q. 6. At the time the Federal Coal Company entered into this contract with the complainant, did it have a contract for the sale, by it, for a large tonnage of coal?

A. We had a good many different ones at that time.

[fol. 136] Q. 7. State whether or not coal that you received from the complainant and shipped to your customers was shipped under contract or sold from time to time on open market?

A. It was sold on the open market.

Q. 8. In the sale of that coal did you endeavor to get the best market price you could for the coal you sold?

A. I did get the best market price possible.

Q. 9. Now, I will ask you if the coal was sold by you F. O. B. mines just as you bought it?

A. Yes, sir.

Q. 10. Before the complainant begin shipping coal under the contract, had it been selling coal to the Federal Coal Company?

A. Yes, sir.

Q. 11. In what name?

A. Cumberland Coal Co., John D. Flanagan, and Cumberland Mountain Coal Co.

Q. 12. Have you in your files, invoices received for coal purchased from the complainant in these several names?

A. Yes, sir.

Q. 13. Do these invoices show the dates of the purchases and shipments?

A. Yes, sir.

Q. 14. I will ask you to make up a statement beginning with June 1st and extending to September 1st showing coal purchased from either of these three Companies by your Company, that is, the John D. Flanagan Coal Co., the Cumberland Coal Company, and the Cumberland Mountain Coal Co.?

[fol. 137] A. I will.

Q. 15. I will ask you to let that statement show the dates of the respective purchases, the tonnage and the price and number same Exhibit "C"?

A. Yes, sir, I will.

Exhibit "C."

Q. 16. You were also asked in your former direct examination to file as Exhibits 1, 2, 3, etc. in numerical order, the bills of coal covering the coal shipped under this contract. Have you filed that, Mr. Thompson?

A. No, sir.

Q. 17. Will you now kindly get busy and file those also?

A. I will.

Q. 18. Mr. Thompson, I will ask you whether or not you are now able to give from memory the prevailing market price of "run of mine" coal produced in the Tracy City district, such as covered by the contract in this case, during the months mentioned in this contract?

A. Just previous to coming over here, I looked over our records and ascertained prices which we secured for coal during that period, and that search disclosed the fact that during the month of September we sold approximately all the coal which we shipped from Tracy City at \$9.75 per ton, possibly one or two cars, for \$10.00. During October what we shipped we sold for \$7.75. During November and December we received \$9.00.

Q. 19. As "Exhibit F" Mr. John D. Flanagan has filed a copy of a telegram dated September 20th 1920, addressed to him and sent [fol. 138] by the Federal Coal Company directing shipment of coal to Godley & Griffin. I will ask you, if that is a copy of the telegram that was sent by the Federal Coal Company to Mr. Flanagan on that date?

A. It is, I took it out of our files myself.

Q. 20. At the time you sent that telegram how much coal had you then under contract of sale to Godley & Griffin of this "run of mine?"

A. Approximately 50 cars. We had a 50-car order and they may have shipped a few cars on it about the time we sent that telegram.

Q. 21. Mr. Flanagan has filed as Exhibit "G" to his cross-examination an original invoice, dated July 7, 1920, to the Federal Coal Company in the name of the Cumberland Coal Company. I will ask you to say if that is an invoice of a car of coal bought by the Federal Coal Company on that date?

A. It is.

Q. 22. Mr. Thompson, you have been asked in your direct examination to file a statement of coal actually received from the Cumberland Mountain Coal Company, or from the complainant, Flanagan, under the contract in suit, and to show the dates, etc. That statement you have not yet prepared you say?

A. No, sir.

Q. 23. I will ask you whether or not you have looked over your records sufficiently to say, from your records, now, as to the number of cars shipped and received in the month of September?

A. Yes, sir, I looked over the records. We received 36. [fol. 139]

Q. 24. I will ask you whether or not during the month of September 1920 the complainant tendered or offered to ship any additional cars of coal than those that were actually shipped?

A. I feel confident that he did not; of course we have no positive record of his having done so, or not having done so. The fact we had instructed him to ship to Godley & Griffin everything he got out, I hardly feel that it would have been possible or natural for him to have asked us for any other shipping instructions.

Q. 25. As Exhibit "D" to the testimony of Mr. Flanagan is filed letter dated April 12th, 1921. I call your attention to it and ask you

whether or not this was the first demand made by Mr. Flanagan upon the Federal Coal Company on account of an alleged breach of contract sued on?

A. Yes, sir, that is the first communication in regard to it.

Q. 26. In the testimony in this case, Mr. Flanagan himself refers more than once to telephone conversations had with you, with respect to shipment of coal under the contract. I will ask you to say what you remember about having had such telephone conversations with Mr. Flanagan?

A. My memory is not nearly as good as Mr. Flanagan's, I am most positive, however, he didn't talk to me over the telephone at all.

Q. 27. Aside from the fact that you don't remember such conversation, what, if any other reason is there for being positive about it?

A. The reason I am positive I was very busy and didn't want to [fol. 140] talk to him on the telephone and when he called I told Mr. Chrosniak to talk to him.

Q. 28. Was or not the business of Mr. Chrosniak in the office to attend to that kind of things?

A. Yes, sir.

Q. 29. Mr. Thompson, what was the average car of coal shipped from the Tracy City District during 1920, particularly the early part up to September?

A. About 40 tons.

Redirect examination.

By Judge J. J. Lynch:

Q. 1. The day after you sent the telegram of September 20th to Mr. Flanagan with reference to shipment to Godley & Griffin, you ordered coal shipped to other parties instead of them, didn't you?

A. Not that I remember.

Q. 2. To refresh your recollection didn't you on September 21st order coal shipped to C. C. Company of Cedar Town, Ga.?

A. No, I don't remember any such concern. The document will speak for itself. I don't remember a concern of that name.

Q. 3. Do you know what the C. of D. of Douglasville is?

A. City of Douglasville.

Q. 4. Didn't you order coal shipped to them on the 24th of September?

A. It's barely possible that I did. I have no recollection of that [fol. 141] specific order of that specific date.

Q. 5. On the 25th did you not order coal shipped to Nashland Paper Company at Bolten, Ga.?

A. I don't remember, they are customers of ours, however.

Q. 6. So that you can't tell just how long coal was shipped under this order of September 20th, can you?

A. I looked at our books just before coming over here and they show, along in the month of September till nearly the end of the month we had two to three cars a day almost every day.

Q. 7. Your statement you have promised to file will show exactly how much you shipped?

A. Yes, sir.

Q. 8. In your former testimony you state that at the time you ceased giving shipping instructions to the complainant under this contract, the people to whom you sold coal were declining to receive this coal you had sold to them. Can you give us the names of the Companies who cancelled orders on you to whom you had sold this coal of the complainant's?

A. Yes, sir,—Emmons Coal Mining Co. of Philadelphia.

Q. 9. Who else?

A. That is all.

Q. 10. How much had you contracted to them?

A. 100 cars.

Q. 11. Had you given any shipping instructions to the complainant for this?

A. No, sir.

Q. 12. But you had intended to furnish it out of the complainant's contract?

[fol. 142] A. I had definitely sold it to the other people and they were going to begin shipping the first of October.

Q. 13. When did you sell it to the Emmons Coal Co.?

A. About September 25th or 26th.

Q. 14. Sold them this coal you had bought from the complainant?

A. I didn't describe it as coal contracted from John D. Flanagan, but I sold them Tracy City "run of mine."

Q. 15. That was the only Tracy City "run of mine" that you had bought?

A. That I had bought, yes, sir.

Q. 16. When did they cancel this contract on you?

A. They didn't cancel it.

Q. 17. They just kept delaying.

A. They just failed to take it.

Q. 18. Failed to give you shipping instructions for it?

A. It was government business and they promised me they would have government bills-of-lading for it which they failed to send, later on telling me I would have to cancel, they could not use it.

Q. 19. When did they tell you that?

A. Probably in October or November.

Q. 20. At what price did you have it sold to these people?

A. I don't remember.

Q. 21. Approximately?

A. Possibly it was more than we had bought it for, we had a profit of 25-cents or 50-cents a ton.

Q. 22. Have you called on these people to answer for damages [fol. 143] they caused you by not taking this coal?

A. Yes.

Q. 23. Have they settled for it?

A. No.

Q. 24. Have you sued them?

A. Yes.

Q. 25. Where is the suit pending?

A. Philadelphia.

Q. 26. Is that one of the reasons you didn't order out this coal from the complainant?

A. Yes, sir.

Q. 27. I notice that during the month of December you ordered coal from the complainant did you have it shipped to Key West, Fla.?

A. Yes, we shipped it in November and December.

Q. 28. To whom did you sell it at Key West?

A. We sold it to Eumons Coal Mining Co. and they ordered it shipped there.

Q. 29. Then you are mistaken about the time they cancelled this order, are you not?

A. No, sir.

Q. 30. If they shipped on through November and December they had not cancelled the order until after that date?

A. That is a different proposition; we had two different contracts with them.

Q. 31. One they filled and one they didn't?

A. One they accepted and one they didn't.

Q. 32. When did you make the contract with them under which they took this coal?

A. Probably the latter part of October or the first part of November.

[fol. 144] Q. 33. How many cars was covered by this contract?

A. The exact number Mr. Flanagan shipped, according to my recollection, is about 30, but the records will show exactly what he shipped to Key West.

Q. 34. You shipped to the Quartermaster at Key West?

A. Yes, U. S. Government, Quartermaster Dept., at Key West.

Q. 35. You shipped coal through October and November to the Gulf States Steel Co., Alabama City, Ala., also didn't you?

A. I think only during October.

Q. 36. Did they terminate any contracts on you?

A. We didn't have any with them.

Q. 37. Your Company would not consume the coal at all?

A. No, we didn't burn it.

Q. 38. You are Brokers?

A. Yes.

Q. 39. And this coal bought from the complainant was for the purpose of re-selling it or filling orders and contracts for other Companies?

A. Yes, sir.

Q. 40. Did you do any export business?

A. Yes, sir, quite a little.

Q. 41. You had some heavy export contracts about that time?

A. Yes.

Q. 42. Were any of those cancelled on you?

A. Not at that time, it had no relation to this coal.

Q. 43. When did the coal business begin to decline?

A. Possibly the market was not so brisk beginning sometime in [fol. 145] October—the month of September was very good and the month of October possibly not quite so good.

Q. 44. You spoke of selling coal at \$9.00 and \$10.00 during November and December; that was on prior contracts, was it not?

A. I don't think I mentioned any \$10.00 coal those months; we sold some at \$9.00 the latter part of October and shipped it in November and December; those were spot sales, they were not contracts.

Q. 45. The coal shipped in November and December was not on coal sold during November and December?

A. It was sold, I think, about the last day of October.

Q. 46. Don't you know as a matter of fact coal went down as low as \$2.00 in December?

A. No, sir.

Q. 47. Didn't this Tracy City "run of mine" go down to \$2.00?

A. No, sir, not to my knowledge.

Q. 48. You don't pretend to know what the market price of Tracy City "run of mine" was during November and December?

A. I didn't sell any.

Q. 49. Who were your principal customers to whom you sold coal; that is, brokers during this year, 1920?

A. That can hardly be answered off-hand; we sold hundreds of different people.

Q. 50. I mean the principal ones during the summer and fall of 1920?

A. We sold a large amount to C. A. McCray, Columbia, S. C., a large amount to Godley & Griffin, Logan Supply Co., Jacksonville, Ajonte & Rojo Coal Co., Cuba; Thompsons Company, Thompsons, [fol. 146] Ga., Panola Mills, some place in South Carolina. I don't think of any more off hand.

Q. 51. Did any of these parties breach any of their contract with you during that time, when prices went *went* down?

A. Yes, sir.

Q. 52. Who were they?

A. Panola Mills, Godley & Griffin.

Q. 53. Are you seeking to hold them for damages for the breach of their contract?

A. Yes.

Q. 54. Are you seeking to recover the damage between the contract and the market price from each of these people?

A. Yes, sir.

Q. 54. When did Godley & Griffin breach their contract?

A. Probably about the last of October.

Q. 55. How much had you contracted to sell them?

A. I don't remember the amount.

Q. 56. Can you remember the amount of the breach, how many cars they failed to take that they contracted to take?

A. It was not exactly that kind of an arrangement; the conflict with Godley & Griffin had several angles that we settled with them without suit.

Q. 57. Did their contract cover the taking of the coal from the complainant?

A. No, sir.

Q. 58. Whose coal were they to take that they did not take?

A. That was not understood,—just specified open market.

[fol. 147] Q. 59. Run of mine?

A. Yes, sir.

Q. 60. They did take some of this coal of the complainant's?

A. We applied some on the order; we took an order for so many cars of coal to be shipped when they wanted it.

Q. 61. Can you give us the names of the other companies you had bought coal from whose coal you did not take when the price went down?

A. We had a contract with the Royal Coal & Coke Company—we bought from other people and we failed to take that when our customers failed to take over ours.

Q. 62. Whose coal was that?

A. Williams Coal Company.

Q. 63. Where are they situated?

A. Hopkinsville, Ky., and Royal Coal & Coke Co. at Birmingham, Ala.

Q. 64. What other coal Company did you contract with for coal you didn't take?

A. None.

Q. 65. Not having any controversy with any other coal Company about not taking their coal?

A. No.

Q. 66. You are having a controversy with the Cory Coal Co., aren't you?

A. Not about taking coal, about their not delivering to us.

Q. 67. What other Coal Company did you deal with and from whom you bought coal during this period, during the Autumn of 1920?

A. Hundreds of different concerns from whom I bought.

[fols. 148 & 149] Q. 68. I mean from whom you contracted for coal as a Broker for re-sale?

A. I think of no other contracts excepting two made with the Chattanooga Coal Co.

Q. 69. Were they brokerage contracts?

A. Yes, sir.

Q. 70. Was that coal for sale in the same manner as the other coal you have handled?

A. Yes, sir.

Recross-examination.

By C. C. Moore:

Q. 1. Mr. Thompson, you have mentioned that the Federal Coal Company was doing business of buying and selling coal during this period,—sometimes referred to as a brokerage business—I will ask

you whether or not it also during the time, owned and operated a coal mine?

A. Yes, sir.

Q. 2. About what was its output per day of coal?

A. 20 to 25 cars.

Q. 3. Did it sell its own coal?

A. Yes.

Q. 4. In addition to producing coal at its mines, it bought coal also for sale?

A. Yes, sir.

Re-redirect examination.

By Judge J. J. Lynch:

Q. 1. Its mines are situated in Kentucky?

A. Yes.

Q. 2. Did you have a brokerage license during this time?

[fol. 150] A. No, sir.

Q. 3. You mean the Federal Coal Company had no license?

A. No sir.

The further taking of this deposition continued pending the filing of exhibits called for.

[fol. 151] DEPOSITIONS OF W. T. THRASHER ET AL.—Filed March 22, 1922

The Depositions of W. T. Thrasher, H. L. Cory, and T. O. Busbee,
Taken by Agreement of Counsel on March 7th, 1922, at 9.00
o'clock a. m., at the Office of Allison, Lynch & Phillips

All formalities, caption, certificate and signatures waived.

W. T. THRASHER, first witness, after being duly sworn, deposed as follows:

Direct examination.

By Judge J. J. Lynch:

Q. 1. Where do you live and what business are you engaged in?

A. Live in North Chattanooga.

Q. 2. What business are you in?

A. Coal business.

Q. 3. Are you a coal Broker?

A. Yes.

Q. 4. What business were you in in 1920?

A. I was connected with the U. S. Fuel Corporation the last six months of 1920.

[fol. 152] Q. 5. Were you acquainted with the usual and cus-

tomary method of the trade with reference to the order of shipping coal among Brokers in this section at that time?

A. I was acquainted with the custom that the U. S. Fuel Corporation had; they were the only Brokers or wholesale people I had worked for.

Q. 6. I will ask you whether or not it was the custom at that time when coal was purchased by Brokers for re-sale for the Broker to give shipping instructions before the coal was shipped out?

Mr. Moore: The foregoing question is excepted to as leading.

Q. 7. State whether or not it was the custom for Brokers who bought and sold coal to give shipping instructions for the shipment of coal before it was shipped out?

Mr. Moore: The foregoing question is excepted to as leading.

A. Yes, it was with us.

Q. 8. Did you buy any coal from Mr. Flanagan during December 1920?

A. I remember buying four cars, I may have bought more.

Q. 9. What did you pay him a ton?

A. \$2.00.

Cross-examination.

By C. C. Moore:

Q. 1. What was your connection with the U. S. Fuel Corporation; what was your position?

[fol. 153] A. I was Assistant Sales Manager.

Q. 2. Who was the Sales Manager?

A. Mr. L. T. Dicks.

Q. 3. Who was the chief officer?

A. T. O. Busbee.

Q. 4. It was a Corporation was it, or was it a partnership?

A. I believe at that time it was a Corporation.

Q. 5. Mr. Busbee was the owner, or at least principal owner?

A. Yes.

Q. 6. Did you have more or less acquaintance with the coal that was handled by the Fuel Corporation during the time you were connected with it, that is, the source from which it came?

A. Yes.

Q. 7. From what place did the U. S. Fuel Corporation secure the coal they handled?

A. Just wherever they could purchase the coal; at that time coal was hard to purchase, it had been, and the market was dropping off, had been going down. I guess they bought most of the coal from the Middlesboro field.

Q. 8. What time did you go with the U. S. Fuel Corporation?

A. Along in June.

Q. 9. And how long did you remain with them?

A. Until January 1921.

Q. 10. When you went with the Fuel Corporation about what was the price of coal?

A. I really could not say without referring to the records.

[fol. 154] Q. 11. Was it then a high price and still increasing in price?

A. Yes.

Q. 12. Very acute market?

A. Yes.

Q. 13. That condition continued until in October did it?

A. I believe it was October when it started back down.

Q. 14. Did the U. S. Fuel Corporation buy and handled coal during that period from the Tracy City field?

A. Yes.

Q. 15. Can you give the names of the Tracy City Brokers or operators from which the U. S. Fuel Corporation handled coal during that period?

A. They bought from so many of them up there; they bought from Mr. Flanagan, and Tracy City Coal Co., and Tennessee Consolidated Co., Flat Branch Coal Company, Cumberland Coal Co., or Cumberland Mountain Coal Company, I don't remember which it was, and Dixie Coal & Iron Company, or something like that.

Q. 16. Quite a good many people during that high market sprung up around Tracy City as coal Brokers and dealers, didn't they?

A. Yes, sir.

Q. 17. And your concern bought from a number of them?

A. Yes, sir.

Q. 18. You bought from Mr. Flanagan?

A. Yes, sir.

Q. 19. Do you remember in what name or style Mr. Flanagan sold coal to you during that period?

[fol. 155] A. Well, I think the Tracy City Coal Company, I think Mr. Flanagan was also interested in the Cumberland Coal Co. or Cumberland Mountain Coal Company.

Q. 20. And also the John D. Flanagan Coal Company?

A. I will not be positive whether there was a John D. Flanagan Company or not.

Q. 21. You don't remember?

A. No.

Q. 22. You do remember that Mr. Flanagan was connected with the Tracy City Coal Company and the Cumberland Coal Company, and Cumberland Mountain Coal Company?

A. Yes, sir.

Q. 23. Did your concern buy very much coal from the Cumberland Mountain Coal Company during that period?

A. I really could not say without referring to the records.

Q. 24. Did you buy very much from the Tracy City Coal Company?

A. I could not tell you that.

Q. 25. From your memory what would you say?

A. Well, during high prices we bought all we could from everybody.

Q. 26. And were you able to get a considerable quantity from the Tracy City Coal Company during that period?

A. We got some, just how much I could not say.

Q. 27. Did you continue to buy from the Tracy City Coal Company all through the time you were with the U. S. Fuel Corporation?

A. Yes.

[fol. 156] Q. 28. And continued to buy from the Cumberland Mountain Coal Company during that period?

A. I don't remember about that, the records will show that.

Q. 29. In buying from the Tracy City Coal Company and the Cumberland Mountain Coal Company you dealt with Mr. John D. Flanagan in both instances, did you?

A. Yes, sir.

Q. 30. He was the manager or man in charge of both of these concerns?

A. Yes, sir.

Q. 31. You remember, you said, of buying four cars from Mr. Flanagan, in what name did Mr. Flanagan sell you those four cars?

A. As well as I remember it was the Tracy City Coal Company.

Q. 32. About what time was that, which month?

A. December.

Q. 33. Of 1920?

A. Yes, sir.

Q. 34. You were at Tracy City or around in that section more or less during that period of time from June to December?

A. Yes, I was up there.

Q. 35. Your business caused you to go up there to solicit coal?

A. Yes.

Q. 36. During that time was the Tracy City Coal Company operating any mines or was it buying and selling coal?

A. They were operating mines and buying and selling both I suppose.

[fol. 157] Q. 37. Was the Staub Coal Company operating any mines?

A. It is my understanding they were, I was never out there.

Q. 38. Was the Staub Coal Company operating the Tracy City mines?

A. I don't know.

Q. 39. You have said that the record would disclose as to the volume of coal handled from the various concerns, both from the Tracy City Coal Company and otherwise. What record to you refer to?

A. Record of the U. S. Fuel Corporation.

Q. 40. What form do they keep those records in?

A. We have a record sale and purchase sheet.

Q. 41. Please look to the several sheets that are exhibited to the deposition of John D. Flanagan in this case and say whether or not this is the kind of record on which the U. S. Fuel Corporation keeps its transactions of coal?

A. Yes, sir, this is the same kind of record that they keep.

Q. 42. And do these sheets appear to be similar sheets on which they keep their record?

A. Yes.

Q. 43. Do you know how Mr. Flanagan come in possession of these forms of the U. S. Fuel Corporation?

A. No, sir, I have not the slightest idea unless he got them from the U. S. Fuel Corp.

Q. 44. What refreshes your memory as to having bought four particular cars from Mr. Flanagan for \$2.00?

A. The way he begged me to take them.

Q. 45. Where were the cars?

[fol. 158] A. Loaded and on demurrage the way he told it to me.

Q. 46. Where were they at that time, at Tracy City, or had they been shipped to Chattanooga?

A. They were at Tracy City at the mines, he said he had to move them. I may have bought more from him in December, but I remember those particular cars.

Q. 47. Was that less than you paid for other coal in December; in other words was that a sacrifice price?

A. We had paid more for other coal in December but I don't remember paying more for Tracy City coal.

Q. 48. You don't remember buying more?

A. No, sir, I don't.

Q. 49. The deposition which Mr. Flanagan gave and the exhibits attached to that deposition that I have already called your attention to, being the coal sales made by him, shows that in the month of December he sold to the U. S. Fuel Corporation quite a good deal of coal. Will you look to that deposition, please. On the first of December does this Exhibit show three cars sold at \$3.50 a ton?

A. Yes, sir.

Q. 50. Then on the 4th of December one car at \$2.00 a ton?

A. Yes, sir.

Q. 51. It also shows coal sold without any price given at all?

A. Yes, sir.

[fol. 159] Q. 52. There must have been something paid for that?

A. Yes, sir.

Q. 53. It shows that on the 28th of December your Company paid \$3.00 a ton for a car?

A. Yes, sir.

Q. 54. It also shows that during the month of December other purchasers paid various prices from \$3.70, \$5.25, \$8.50, etc., does it not?

A. Yes, sir.

Q. 55. Were you connected with the U. S. Fuel Corporation after it surrendered its charter?

A. I don't know exactly when they surrendered their charter. I was not at the office altogether, I was on the outside also.

Q. 56. Who besides Mr. Busbee was interested financially in that business, if you know?

A. Nobody that I know of. There may have been somebody else but I don't know it.

Q. 57. The business of the U. S. Fuel Corporation was buying and selling coal?

A. Yes.

Q. 58. It did not operate any mines, did it?

A. No, sir.

And further this deponent saith not.

Signature Waived.

Sworn to before me this 7th day of March 1922. B. M. Gorman, Notary Public.

Next witness, H. L. CORY, being duly sworn deposed as follows:

[ol. 160] Direct examination.

By Judge J. J. Lynch:

Q. 1. What business are you in, Mr. Cory?

A. Wholesale coal and coke.

Q. 2. How long have you been in the coal business?

A. 26 or 27 years.

Q. 3. I will ask you to what extent you have been in the wholesale coal business in the Chattanooga district?

A. Since 1916 I have operated a wholesale business under the name of H. L. Cory Coal Company; we have done quite an extensive business all through the South and middle North, buying coal from mines in Alabama, Tennessee and Kentucky.

Q. 4. What is the minimum amount of coal sold by you a year?

A. About \$1,300,000.00.

Q. 5. I will ask you if you think you understand the coal trade, and custom and usage in the coal trade in Tennessee and surrounding States?

A. I think I do.

Q. 6. I will ask you whether when coal Brokers contract for coal it is understood that that coal is to be re-sold before shipped?

A. That is true.

Q. 7. I will ask you what is the custom with reference to ordering out coal by coal Brokers when they have purchased it for re-sale; is the coal shipped by the Vendor at the time provided for by the contract without shipping instructions or do they await for shipping [fol. 161] instructions; what is the custom and usage of that?

A. The operator understands that the Broker has to re-sell the coal and as the Broker re-sells the coal he sends the operator a sheet containing what we call shipping instructions, showing where and when to ship it, how to route it, what kind of cars to put it in, etc.

Q. 8. I will ask you if this usage and custom is of uniform and well known application in this district?

A. It is for the reason the Broker is not a consumer of coal.

Q. 9. I will ask you whether or not this usage and custom is one well understood and followed by the trade in this section?

A. It is.

Q. 10. I will ask you from your experience as a coal man if you know the price of what is known as "Tracy City coal or the coal produced and sold in the Tracy City district that year?

A. I do.

Q. 11. Will you give the price of coal from September to December, the market price of Tracy City coal, produced in Tracy City, F. O. B. Tracy City during those months?

A. Our books show that in September, 1920, we bought a total of 66 cars of Tracy City coal at price running from \$8.00 to \$9.75, the average being \$8.30. The books further show that in October, 1920, we bought of Tracy City coal 14 cars, price running from \$6.00 to [fol. 162] \$7.75, the average being about \$6.83. The books further show that in November, 1920, we bought a total of 48 cars, running from \$3.68 to \$5.60, the average being \$4.05. Also in December, 1920, we bought 21 cars, the price running from \$3.00 to \$3.70, the average being \$3.62.

Q. 12. What time in December did you make these contracts for the December coal?

A. The 20 cars in December, 1920, were purchased about December 9th.

Q. 13. I will ask you whether or not the price continued to drop during the month of December?

A. It did; we paid more than the real worth of the coal for the reason it was Export coal and had to move within a few days; we paid \$3.50 for some coal on the track and \$3.70 for some other shipments.

Q. 14. Do you or not think the market price was lower than that for December?

A. I know we could have bought Tracy City the latter part of December at considerable less money, but we didn't buy it.

Q. 15. Will you file a statement showing the amount of coal you purchased during the months you have indicated and the dates of the contract made for the purchase of this coal as Exhibit "A" to your deposition?

A. I will do so, but wish to explain that some of this coal was undoubtedly purchased by telephone and our records may not show the date. I will file such a statement and show the dates on all coal we have.

[fol. 163] Q. 16. Was any of this coal priced at less than the market price?

A. No, sir.

Cross-examination.

By C. C. Moore:

Q. 1. The memorandum from which you have been testifying was made from your records, was it?

A. It was.

Q. 2. Did you go through your records to ascertain that this was all Tracy City coal handled by you during the months named?

A. If there was any other we overlooked it.

Q. 3. During that time did you have any contracts running that had been previously made for future deliveries and which had not expired, and for which shipments were made during this period?

A. I think not.

And further this deponent saith not.

Signature waived.

Sworn to before me this the 7th day of March, 1922. B. M. Gorman, Notary Public.

T. O. BUSBEE, next witness, after being duly sworn, deposed as follows:

Direct examination.

By Judge J. J. Lynch:

Q. 1. What coal Company are you connected with?

A. U. S. Fuel Corporation.

[fol. 164] Q. 2. What experience have you had in the coal business?

A. About twelve years' experience.

Q. 3. Is the U. S. Fuel Corporation a coal Broker?

A. Yes, sir.

Q. 4. I will ask you if you think you know or are acquainted with the market price of Tracy City coal during the fall of 1920?

A. Yes, sir.

Q. 5. Will you give a statement of what the market price or value of this coal was, F. O. B. Tracy City during the months of September, October, November and December, 1920, per ton?

A. Yes, sir. During September we bought of Mr. Flanagan, Tracy City coal, a total of 17 cars at various prices, running from \$9.75 down to \$7.50, the average price for the month was \$8.26. In October we bought a total of 74 cars, the average price was \$6.18. In November, we bought a total of 6 cars at an average price of \$4.00 per ton, and in December we bought only 8 cars at a price of \$2.62 per ton.

Q. 6. I will ask you whether or not the market was constantly going down during this period?

A. Yes.

Q. 7. I will ask you if it went still lower during the latter part of December?

A. Yes, the last car we bought was \$2.00, the first we bought in December was \$3.50 per ton.

Q. 8. I will ask you whether or not Mr. Flanagan was urging you to take coal during that time?

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[fol. 165] A. Yes, we could have bought all we wanted.

Q. 9. I will ask you whether or not he was urging you to take that \$2.00 coal during the latter part of December?

A. Yes, I could have bought all the \$2.00 coal I wanted.

Q. 10. I will ask you if any of this coal was bought for less than the market price?

A. No, I don't think so.

Q. 11. Mr. Busbee, do you think you know the custom and usage of the trade during that period?

A. Yes, sir, I think I am familiar with them.

Q. 12. I will ask you when a Broker contracted for coal from an operator for re-sale to his customers, if it was the custom for the coal to be shipped before the Broker gave shipping instructions to the Operator; what was the custom in reference to that matter?

A. That is determined at the time of the purchase. For instance, if we bought 50 cars from the operator, we usually state over what period it is to be shipped, and if that coal is not sold, we tell him we will send him shipping instructions where to ship that coal. Fifty cars might be shipped all over the South. Sometimes we buy 50 cars and tell them in the absence of other shipping instructions they can ship to us at Chattanooga, but that is an unusual case, we seldom do that, because it costs money to re-consign coal.

Q. 13. I mean if there was no arrangement he was to ship it to [fol. 166] you direct, it is understood the Broker is to give to the Operator shipping instructions before he ships?

Mr. Moore: The foregoing question is excepted to because leading.

A. We would turn it down if he shipped it to us direct, unless we authorized it; of course we have to work over the telephone and by letter.

Q. 14. The point I am making, in the absence of an understanding to the contrary, whether or not it is the understanding the Operator is to await instructions from the Broker?

A. Yes, sir, we would turn it down otherwise.

Cross-examination.

By C. C. Moore:

Q. 1. As I understand you, that matter of shipping is principally a matter of agreement between the parties at the time they buy the coal?

A. Yes.

Q. 2. And if the man has not the amount re-sold the practice usually is, in the making of his contract, to specify that he will give instructions for the shipment during the period of contract?

A. Yes, sir.

Q. 3. On the other hand if he has it already sold in the making of his contract he would simply provide shipping instructions?

A. Yes, sir.

Q. 4. In your business did you handle it both ways?

[fol. 167] A. Yes, I have handled it both ways.

Q. 5. You had a good deal of coal shipped to your order at Chattanooga and a good deal you gave instructions for at different time?

A. Yes.

Q. 6. And that is true during this period and before and since this time?

A. Yes.

Q. 7. In the giving of price of coal bought by your Company during that period you have given merely averages. I will ask you to give itemized prices from which these averages are made up if you have got the statement in shape for filing?

A. In September, 4 cars at \$9.75.

Q. 8. Give who they were bought from and the dates?

A. Bought from John D. Flanagan; we bought 4 cars at \$9.75, the first part of the month; this is taken from the sheet ranging from the first down to the 31st. I don't seem to have the date on September. One car at \$8.50, one car at \$8.25, 3 cars at \$8.25, 7 cars at \$7.50, one car at \$7.50, total 17 cars, average price \$8.26 in September. In October, on the first, 2 cars, \$7.75, on the 2nd, 4 cars, \$7.75; on the 4th, 2 cars at \$7.75, on the 8th, 2 cars at \$6.00; on the 9th, 3 cars at \$6.00; 11th, 6 cars at \$6.00; 16th, 1 car at \$6.00; 11th, 2 cars at \$6.00; 12th, 4 cars at \$6.00; 13th, 5 cars at \$6.00; 14th, 7 cars at \$6.00; 15th, 1 car at \$6.00; 19th, 3 cars at [fol. 168] \$6.00; 20th, 8 cars at \$5.00; 21st, 7 cars at \$6.00; 22nd, 2 cars at \$6.00; 21st, 1 car at \$6.00; 22nd, 1 car at \$6.00, all these are \$6.00 with the exception of 8 cars at \$7.75, marking an average price of \$6.16 for the month of October. November 11th, 4 cars at \$4.00; 18th, 1 car at \$4.00; 23rd, 1 car at \$4.00, total, 6 cars at \$4.00. December 1st, 2 cars, \$3.50; 1st, 1 car at \$3.50; 4th, 1 car at \$2.50 and on the same date 4 cars at \$2.00, average price \$2.62 for December.

Q. 9. Was all of this coal you mention bought from John D. Flanagan?

A. Yes, sir.

Q. 10. In what name or style did he bill it to you?

A. Usually from the Cumberland Mountain Coal Company and John D. Flanagan part of the time; at the beginning it was Cumberland Coal Company and then he changed the name of it to Cumberland Mountain Coal Company.

Q. 11. That was Mr. Flanagan?

A. I understood it was Mr. Flanagan's Company, he was doing business under that name.

Q. 12. You still have preserved the invoices?

A. Yes, sir.

Q. 13. By referring to those you could determine just how each car was billed, under what name?

A. Yes, sir.

Q. 14. Are these dates that you have given, dates of the invoices or the date of the shipment or the date cars were received?

A. The date the car was supposed to leave the mines.

[fol. 169] Q. 15. That would be the date they were invoiced to you?

A. Yes, sir.

Q. 16. Did you attend to the buying of coal yourself or did you have other employees under you?

A. I bought a good deal myself from Mr. Flanagan and we had buyers during that period.

Q. 17. Did you cover the Tracy City territory yourself?

A. No, sir, I had a man over there.

Q. 18. Who was the man?

A. W. T. Thrasher.

Q. 19. He is the man of your organization that would be the most familiar with the Tracy City territory during that period?

A. Yes, when the prices begin to decline we took off our buyers; the operators would call up over the telephone urging us to take coal.

Q. 20. That condition developed along in October?

A. Yes, in October it begin to break.

Q. 21. And after that time you just had to be a "taker" and not a "buyer?"

A. Yes, sir.

Q. 22. During this high water market for coal in July, August and September of 1920 did there spring up in the Tracy City district a number of coal dealers, that is, Brokers, as well as small operators?

A. There was a good many small operators, I don't know of any Broker outside of Mr. Flanagan, except, I think there was one Company that organized a little side issue of their own big Corporation that billed their coal through that little concern to cover up certain [fol. 170] things. There was a good many concerns that sprung up during that time, mostly small operators,—wagon mines,—that had a few holes in the ground, got out a few cars a week.

Q. 23. Would it be very much trouble, Mr. Busbee, and would you make up a statement of those various cars that you have so kindly given us, showing in addition to the information you have already shown, the shipper, the party that invoiced it to you; and file as Exhibit No. 1?

A. Yes, I could do that, it is quite a little trouble but I think I can get it.

Exhibit No. 1.

Q. 24. That statement will, for convenient reference, embody the information you have already given, the dates, prices, etc., and include in it the shipper?

A. Al-right.

Q. 25. Your office was not the exclusive Sales Agents for Mr. Flanagan's coal in this City, was it?

A. No, sir.

Q. 26. Did you have exclusively Sales Agency for any coal from the Tracy City territory at that time?

A. No, sir.

Q. 27. Did you buy coal any one else in the Tracy City territory that you remember of?

A. Yes, sir.

Q. 28. What other concerns?

A. I think I bought some from the Tennessee Consolidated Coal Company; Nully Ridge Coal Company, which I think was in some way connected with the former Company, and the Flat Branch; I think the Dixie Coal & Iron Company and probably some other [fol. 171] few cars, maybe from Dr. Hembree and Dr. Stone, I think that was all.

Q. 29. Did Mr. Flanagan, in selling coal, represent more than one concern, that is, in addition to this Cumberland Mountain Coal Company; did he also represent the Tracy City Coal Company and possibly other Coal Companies besides?

A. Tracy City Coal Company never did sell us any coal, it was always Cumberland Mountain; I understand the Tracy City coal went to the Railroads. If any of it was shipped to us it was shipped by Mr. Flanagan or the Cumberland Mountain, I think it was all invoiced by the Cumberland Mountain, I am not sure.

Q. 30. This coal that you were getting from Mr. Flanagan he was buying merely in that territory from local mines?

A. I understand that he had interest in mines at different places, I don't know where every car came from or where every car was mined at, there was quite a few mines over there, we bought from him and expected him to ship.

Q. 31. Did you at any time buy any coal from the Tracy City operators about that time?

A. I don't recall that we ever bought any from the Tracy City operators.

Q. 32. Did you ever sell coal for the Tracy City Coal Company?

A. No, sir, never did. I think several years ago we were Agents for one mine over there that Mr. Flanagan was interested in.

Q. 33. Do you remember the style under which that concern was operated?

A. That was the Dixie Coal & Iron Company while the Fuel Ad-[fol. 172] ministration was functioning it.

Q. 34. I believe you say during that period, you didn't yourself go up around the Tracy City district to any considerable extent at all?

A. I know I didn't go up to Tracy City during 1920, I am pretty sure.

Q. 35. In the list of purchases that you have given already, did you include coal bought from other people besides Mr. Flanagan?

A. No.

Q. 36. You say you did buy from other people during the high price period?

A. I bought from other people, I may have bought a little from other operators but it was a small quantity, I remember we had a contract with the Flat Branch Coal Company; I don't think it was out until May 1921; that coal continued to come on to us at a more rapid rate than during the high prices.

Q. 37. That price had been fixed before this period and would not refute the market price?

A. No.

h. B. E. Roberts.....	1 car @	5.60.
Cumb. Mtn. Coal Company.....	2 cars @	5.00.
" " " "	4 cars @	3.68.
h. Dixie Coal & Iron Co.....	7 cars @	4.00.
Cumb. Mtn. Coal Co.....	34 cars @	4.00.
<hr/>		
48 cars. Avg. price \$4.05.		

urchased during December '20:

l. Cumb. Mtn. Coal Co.....	1 car @	3.00.
" " " "	5 cars @	3.50.
" " " "	15 " "	3.70.
<hr/>		
21 cars. Avg. price \$3.62.		

] IN THE CHANCERY COURT OF HAMILTON COUNTY

GRANTING LEAVE TO FILE AMENDED ANSWER & CROSS BILL
—Enrolled April 4, 1922

No. 18713

JOHN D. FLANAGAN

vs.

FEDERAL COAL CO.

s cause on motion respondent, Federal Coal Company, is
l to file an amended answer as as cross bill and by agree-
s cause is assigned to be heard with cause No. 18888 of
Coal Company vs. W. S. Bates et al., and the causes are set
ng on April 21, 1922, with leave to the parties to take
anwhile.

] IN THE CHANCERY COURT OF HAMILTON COUNTY, AT
CHATTANOOGA, TENN.

[Title omitted]

ENDED ANSWER AND CROSS BILL—Filed April 4, 1922.

ve of the Court the Federal Coal Company files this its
answer to the bill filed against it in the above entitled cause,

I

he original answer in this cause was filed and in addi-
defenses set up therein, and chiefly by the cross exami-
Complainant on Saturday, April 1st, 1922, respondent
nd now avers the fact to be that the contract of April 12,
ered into nominally between the Tracy City Coal Company

and Chattanooga Coal Company, for the delivery of 18,000 tons of coal at the rate of 8 cars per week, through a period of one year, after April 12, 1920, at the price of \$3.90 per ton of 2,000 pounds f. o. b. cars at the mines near Tracy City, was in fact the contract of the complainant John D. Flannigan, in which by agreement he used the name of Tracy City Coal Company. The duty and obligation to deliver the 18,000 tons of coal stipulated to be delivered under that contract as between John D. Flannigan and the Tracy City Coal Company rested upon complainant Flannigan. The Tracy City Coal Company was a corporation which owned some coal land near Tracy City, Tenn., and which had before that time leased its coal lands with mining equipment, etc., to the complainant, John D. Flannigan for a royalty to be paid to it upon the amount of coal to be produced, and the said Tracy City Coal Company was not at the time of the making of said contract—and did not contemplate being [fol. 178] at any time during the time for the performance of said contract—either in the business of mining and selling coal or in the business of buying and selling coal. It was simply lessor of mines, and John D. Flannigan was the lessee. The output of the mines leased by the Tracy City Coal Company to Flannigan at that time and during the period of this contract was approximately 300 tons per day. For some reason Flannigan, by permission of his lessor, used the name of the lessor corporation in making a contract for the sale of coal to the Nashville, Chattanooga, and St. Louis Railway, and in making this contract for the sale of 18,000 tons to the Chattanooga Coal Company. The output of said mine not shipped to the railroad was sold by the said Flannigan either in his individual name or in the name of John D. Flannigan Coal Company, or in the name of Cumberland Coal Company, or in the name of Cumberland Mountain Coal Company, all being aliases, nom de plume or trade names which Flannigan used for the sale of this coal. In the operation of the mine Flannigan chartered him a small corporation which he owned, and merely used to mine the coal.

In addition to this mine Flannigan also had several other small mines, some or all of which were wagon mines, which he either owned outright or controlled, and which were operated in different ways, but all primarily by Flannigan. In addition to this, when the coal market later became active and the price was rapidly increasing, Flannigan engaged very extensively in the business of buying and selling coal as a broker, either in his own or in some of the several trade names that he used.

As stated in the original answer the contract of April 12, 1920 whereby Flannigan, in the name of the Tracy City Coal Company sold to W. S. Bates in the name of the Chattanooga Coal Company, 18,000 tons of coal, was predicated upon a contract whereby W. S. Bates had resold this coal to this respondent at an advance of 20¢ per ton, and assigned to this respondent his interest in the said contract. Complainant Flannigan was very shortly advised of the [fol. 179] fact that this had been done, but in accordance with the contract between the parties coal to the amount of about 785 tons, at intervals through the month of April and May, 1920, was ship-

ped by Flannigan in the name of the Tracy City Coal Company as shipper, and billed to the Chattanooga Coal Company as purchaser. The Chattanooga Coal Company, in turn rebilled this coal to the Federal Coal Company at an advance of 20¢ per ton, in accordance with its agreement. When this contract was entered into, and on April 12, 1920, the price of \$3.90 was the full market value of the coal, but very shortly after that time the coal market went up rapidly and as a result, as stated in the original answer the seller did not ship 8 cars per week as contracted, in fact shipped only a total of about 785 tons.

The last shipment was made about the last of May, 1920, and thereafter no amount of persuasion could induce any further shipments to be made. Every possible entreaty, request and demand was made upon John D. Flannigan, who was the Vice President and General Manager of the Tracy City Coal Company, to induce further shipments. At first some pretexts such as car shortage, etc., were offered as an excuse. Later, even this flimsy pretext was discarded. Complainant Flannigan took the position that that contract was the obligation of the Tracy City Coal Company, as a corporation, that he as an individual was in no way responsible, and the corporation wouldn't ship.

This respondent did not at the time know that Flannigan was conducting this business in these several names. It did not know that the contract of April 12, for the delivery of 18,000 tons entered into the name of the Tracy City Coal Company was Flannigan's contract, and that the duty and obligation as between him and the Tracy City Coal Company for delivering the coal under that contract rested upon him alone. This fact was always very carefully concealed from this respondent by complainant Flannigan and he effectively disclaimed any personal responsibility for the delivery of that coal, and represented that that was a corporate contract of the [fol. 180] Tracy City Coal Company, by which it alone was bound. After the contract was breached and this respondent could not secure any more coal under the contract, it threatened suit, when complainant Flannigan represented that the Tracy City Coal Company was not able to and could not be made to respond for any substantial sum, and that a suit for breach of that contract would be barren of results. This representation was untrue.

At the same time complainant Flannigan was mining and selling from the mine leased from the Tracy City Coal Company about 300 tons of coal per day, which he was selling on the open market, except one contract with the railroad which *he* was compelled to observe in order to get a full car supply. This coal which should have come to this respondent Flannigan was selling on the open market, either in his own name or in one of the several trade names which he used, at the current market price which advanced rapidly to \$10 per ton. When the market had reached approximately \$10 per ton, and Flannigan knew that this respondent was obligated by heavy commitments for the delivery of coal, Flannigan offered that he, personally, would sell and deliver to this respondent 200 cars of

coal in the amount of 50 cars per month, during the months of September, October, November and December, at a price of \$9.09 per ton, provided respondent would consent to cancel and surrender its right of action for damages for the breach of contract of April 12, 1920 above set out. Flannigan claimed to desire this only because he was a stockholder to the amount of 25% to 33 1/3% of the stock of the Tracy City Coal Company, and because he was such stockholder he desired to relieve the Tracy City Coal Company of its liability for breach of that contract.

Then, in the belief that the Tracy City Coal Company was alone responsible for the breach of the contract of April 12, 1920, and that it was of limited responsibility as represented by complainant Flannigan, this respondent consented to and did enter into the contract dated August 19, 1920, sued on by the complainant in this cause.

[fol. 181] Your respondent now avers that complainant Flannigan procured this contract sued on in this cause by fraudulent misrepresentations of fact and fraudulent concealments of material facts. He misrepresented and fraudulently concealed the fact that the duty and obligation to ship and deliver the coal contracted for under said contract of April 12, 1920 rested upon him, and that the coal which he was contracting to ship and deliver under the new contract of August 19, 1920 was the same coal which he was already obligated to ship and deliver at a much lower price under the previous contract. He misrepresented the fact with respect to the solvency of the Tracy City Coal Company and its ability to respond in damages, and by these fraudulent misrepresentations of fact and fraudulent concealments of fact, he induced your respondent to enter into the contract sued on. As stated, this fraud was only discovered by the cross-examination of the complainant Flannigan on April 1, 1922, and your respondent pleads and relies on said fraud of complainant Flannigan as making void the contract sued on.

Your respondent further says that at the time this contract of August 19, 1920 was entered into and on September 1, 1920 when the same was to take effect, there was then due and undelivered under the previous contract of April 12, 1920, a large amount of coal, and by the provisions of said first contract there was due to be delivered during the four months of September, October, November and December, approximately 150 cars of coal, so that by this second contract complainant Flannigan did not assume an obligation for the delivery of coal equal to the obligation that he was already under, and this respondent did not by the making of this second contract with Flannigan secure any additional coal than it already was entitled to receive under the previous contract.

Consequently respondent says that there was no consideration for the second contract, and the increased price stipulated for therein.

Your respondent says that if it had known that complainant [fol. 182] Flannigan was obligated to ship and deliver the coal which it already had contracted for and that by the making of this second contract it was only getting 200 cars of coal from Flannigan to which

it was already entitled, that it would not have entered into such a contract at all.

It is true that this second contract was guaranteed by a surety. However, as stated, the Tracy City Coal Company was in fact able to respond. Also, complainant Flannigan who was solvent was liable for the breach of that first contract. Consequently respondent says that the guaranty given for the performance of the second contract was not a beneficial consideration to respondent, but the offering and giving of this guaranty only made effective the fraudulent misrepresentations and concealments of complainant Flannigan as herein above set out.

II

Respondent would now show that under and by means of said fraudulent contract of August 19, 1920, complainant Flannigan shipped and delivered 73 cars of coal, amounting to 3,959.4 tons. For this coal Flannigan collected from the Federal Coal Company at the rate of \$9 per ton for 43 cars and at the rate of \$8.50 per ton for 30 cars, collecting a total amount of \$34,852.27 which was paid to him from day to day beginning with September 1, 1920 and ending with December 31, 1920. The coal shipped and delivered by said Flannigan should have been shipped and delivered by him under the previous contract and charged at the rate of \$3.90 per ton, and he should have received for said coal the sum of \$15,441.66. He actually received the sum of \$18,410.61 more than he was entitled to receive and your respondent charges that said Flannigan is indebted to it in the sum of \$18,410.61 with interest thereon from December 31, 1920.

III

And now your respondent being advised that on the facts it is entitled to relief, prays to file this its answer as a cross bill against [fol. 183] John D. Flannigan, and that process issue and be served upon the said Flannigan and that he be required to answer this cross bill, but not under oath, the oath to his answer being waived.

On the hearing grant cross complainant a decree against John D. Flannigan for the said sum of \$18,410.61 wrongfully collected by him, together with interest thereon from December 31, 1920.

Grant general relief.

Chas. C. Moore, Solicitor for Cross Complainant.

[fol. 184] IN CHANCERY COURT OF HAMILTON COUNTY

[Title omitted]

ANSWER OF JOHN D. FLANAGAN TO CROSS-BILL FILED AGAINST
HIM IN THIS CAUSE

For answer to said cross-bill, respondent says that it is true that a contract was entered into between the Tracy City Coal Company and

the Chattanooga Coal Company in April 1920, but neither this respondent nor the cross-complainant, Federal Coal Company were parties to said contract.

It is not true that said contract was entered into by the Chattanooga Coal Company on behalf of the Federal Coal Company. Certainly, if this were true, it was done without the knowledge or consent of either the Tracy City Coal Company or of this respondent.

It is true that the Tracy City Coal Company had as agent in Chattanooga, one T. O. Busbee, who, under their agreement might sell this coal and said T. O. Busbee had the exclusive right to sell this coal. Said T. O. Busbee would not have made this contract with the Federal Coal Company, and the Tracy City Coal Company would not have made this contract with the Federal Coal Company against the advise of said T. O. Busbee who had the exclusive contract on same. This fact was well known to the officers of the Federal Coal Company. If knowing this fact, they attempted to bring about the contract for their own use by concealing the fact that the Federal Coal Company had an interest in such arrangement, it would have been a fraud upon the rights of the Tracy City Coal Company and [fol.185] the cross-complainant does not come into this court with clean hands and should be repelled on account of such fraud.

Respondent denies that the Federal Coal Company had or ever acquired any valid interest in the said contract. Said contract was not assignable and could not have been legally assigned to the Federal Coal Company without the consent of the Tracy City Coal Company, which consent was never given, and the fact of the so-called *assignment* was concealed. The coal that was shipped under this contract was shipped direct to the Chattanooga Coal Company and paid for direct by the Chattanooga Coal Company.

The said Federal Coal Company well knowing that the Tracy City Coal Company would never recognize it in the transaction.

Respondent denies that this contract was made on his behalf. The contract was made on behalf of the Tracy City Coal Company, as it shows on its face. The fact that there was a contract between the Tracy City Coal Company and your respondent was made known to the officers of the Federal Coal Company long before the contract sued upon by your respondent in this case, was entered upon. Every allegation to the contrary is absolutely untrue.

Respondent denies each and every allegation of fraud or concealment made in the cross-bill; denies that the Federal Coal Company is entitled to any relief in this case; denies that the cross-bill was filed in good faith by the Federal Coal Company.

He denies every other material allegation in the cross-bill not here admitted, explained or denied, and respondent insists that he is entitled to the relief asked for in the bill. And now having fully answered, respondent prays that the cross-bill be dismissed.

C. H. Garner, Allison, Lynch & Phillips, Attorneys.

[fol. 186]

April 7th, 1922.

T. O. BUSBEE, being re-called for further examination, deposed as follows:

Direct examination.

By Judge J. J. Lynch:

Q. 1. You have been heretofore examined once in this case, have you not?

A. Yes, sir.

Q. 2. I believe, Mr. Busbee, you represented the Tracy City Coal Company as agent in making the contract with the Chattanooga Coal Company in April, 1920?

A. Yes, sir.

Q. 3. Did you purport or pretend to represent Mr. Flanagan personally in that transaction?

A. No, sir.

Q. 4. Was it suggested to you or did you have any hint that the Federal Coal Company had any interest in that contract or that Mr. Bates was acting for the Federal Coal Company?

A. No, sir.

Q. 5. I will ask you if you would have made the contract with the Federal Coal Company?

Mr. Moore: The foregoing question is excepted to because asking for a conclusion and speculation and not a fact.

A. No, sir.

Q. 6. Why, Mr. Bates?

A. Well, at that time, we had some difference with the Federal [fol. 187] Coal Company and our dealings were not altogether satisfactory.

Q. 7. I will ask you if you afterwards understood from Mr. Bates that he had sold this coal, or some of it, to the Federal Coal Company?

A. Yes, I learned afterwards from Mr. Bates they had sold part of it or all of it to the Federal Coal Company.

Q. 8. At that time were you informed that Mr. Bates had assigned the contract to the Federal Coal Company?

A. No, sir.

Q. 9. When did you first hear of that and from whom?

A. I think Mr. John Flanagan told me he had learned that the Chattanooga Coal Company had assigned the contract to the Federal Coal Company.

Q. 10. About when was that?

A. I imagine two or three months after the contract was made.

Q. 11. Did Mr. Flanagan say whether or not he was going to carry it out?

A. He said he was not.

Q. 12. I will ask you whether or not he said he had been advised by his attorney the Chattanooga Coal Company had no right to assign it to the Federal Coal Company?

Mr. Moore: The foregoing question and any answer thereto are excepted to because hearsay testimony and because self-serving declamation.

A. That is what he said.

Q. 13. I will ask you if the Tracy City Coal Company delivered [fol. 188] any more coal, or any more coal was delivered on that contract after this time, to your knowledge?

A. Not to my knowledge.

Q. 14. I will ask you if you ever heard from Mr. Bates or the officers of the Federal Coal Company, or any other person, or from any other source during all this time, that the Tracy City Coal Company was insolvent or unable to carry out and comply with the contract?

A. No, sir, I did not.

Q. 15. I will ask you if you have ever heard of such a thing being hinted until the last day or two?

A. I have never heard that, except Mr. Flanagan told me yesterday the question had been brought up.

Q. 16. What experience did you say you had had as a coal man, Mr. Busbee, in this section?

A. I have been here five years in the coal business.

Q. 17. I will ask you if the expression "go ahead and bust yourself" has any particular significance in the coal trade?

A. I have never heard of it.

Q. 18. I will ask you if the coal trade itself has understood when a man tells another to "go ahead and bust himself" he means to go ahead and ship coal to him?

A. I never heard of it.

Cross-examination.

By C. C. Moore:

Q. 1. Why was the guarantee demanded in the making of this contract of April 12th?

A. Well, I didn't think they were sufficiently responsible to take [fol. 189] them on that contract.

Q. 2. And to insure the responsibility of the purchaser you insisted on a guarantee?

A. Yes, sir.

Q. 3. Mr. C. M. Preston was and is absolutely solvent?

A. That is what we thought at the time.

Q. 4. You still think that?

A. Yes, sir.

Q. 5. Mr. Preston was at the time and still is Cashier of the Hamilton National Bank?

A. Vice-President.

Q. 6. Anyway an officer of the Hamilton National Bank?

A. Yes, sir.

Q. 7. You know that Mr. C. M. Preston was largely interested in the Coal Company and his brother T. R. Preston was President?

A. I don't know that positively, but I understood both were interested in the Federal Coal Company.

Q. 8. And when you saw C. M. Preston guarantee that contract, you drew an inference the Federal Coal Company was in some way interested in the deal?

A. No, I didn't.

Q. 9. How soon before you learned of the fact they had some kind of an interest in it?

A. When Mr. Flanagan told me that the contract had been assigned over to the Federal Coal Company.

[fol. 190] Q. 10. You think that was a month, two months or three months after the contract was made?

A. Two or three months.

Q. 11. You didn't yourself keep any tract of the shipments made under the contract?

A. No.

Q. 12. You don't know what coal was shipped or where it was shipped?

A. I do the first part of the contract.

Q. 13. In what way?

A. They would mail me a check each month for my commissions on the tonnage shipped, I think I received two commission checks.

Q. 14. About what would they amount to?

A. I don't remember.

Q. 15. Were they large or small?

A. I think they were over 15 cents, probably \$200.00 or \$300.00 or probably \$100.00 or \$200.00.

Q. 16. Fifteen-cents on the coal actually shipped?

A. Yes, sir.

Q. 17. After shipments stopped they then settled and paid you a lump sum for commissions?

A. Yes, sir.

Q. 18. Mr. Flanagan paid you that lump sum to satisfy your further claim under the contract of the Tracy City Coal Company?

A. Yes.

Q. 19. Can you recall about when it was that this final settlement was made of your commissions?

A. No, I don't remember, several months, after the contract stopped, probably three or four months.

Q. 20. At the time you were making the contract you were not [fol. 191] advised in any way that the contract was other than the property of the Tracy City Coal Company?

A. That is all.

Q. 21. Who told you that?

A. It was made by the Tracy City Coal Company and Mr. Flanagan told me before any contracts were made or entered into it would

have to be approved by the President and signed by the President, Mr. Beesley.

Q. 22. And were you told at any time in connection with the matter, that Mr. Flanagan was not in any way personally interested aside from the fact he was a stockholder?

A. I was not told.

Q. 23. You had no particular reports on the subject, except the mere fact you were instructed to negotiate it in the name of the Tracy City Coal Company and did do that, and you had no information to the contrary than it was the Tracy City Coal Company contract?

A. No.

Q. 24. Who authorized you to negotiate and make the contract?

A. Mr. Flanagan.

Q. 25. Mr. Busbee, you have mentioned that there was an unpleasantness between you and the Federal Coal Company at that time. I will ask you whether or not there was any unpleasantness between the Tracy City Coal Company and the Federal Coal Company [fol. 192] pany so far as you knew at that time?

A. Not that I know of.

Q. 26. The unpleasantness you refer to is a lawsuit the Federal Coal Company brought against you charging breach of contract?

A. Yes, sir.

Re-examination.

By Judge J. J. Lynch:

Q. 1. Did they win the case?

A. No, sir.

Recross-examination.

By C. C. Moore:

Q. 1. You defeated the suit on the ground of their failure to have a license?

A. Yes, sir.

Q. 2. That was in Judge Yarnell's Court, Circuit Court of Hamilton County?

A. Yes.

Re-examination.

By Judge J. J. Lynch:

Q. 1. You mean Judge Yarnell held they had no right to make a contract in this County because they had not complied with the law or paid their taxes, is that it?

A. Yes, sir.

And further this deponent saith not.

W. S. Bates. Signature waived. Previously sworn to.

[fol. 193] Next witness, C. E. WERNER, after being duly sworn, deposed as follows:

Direct examination.

By Judge J. J. Lynch:

Q. 1. Are you an officer of the staubb Coal Company?

A. Yes, President.

Q. 2. I will ask you if you know Mr. John Chrosniak the Agent of the Federal Coal Company?

A. Yes, sir.

Q. 3. I will ask you whether or not in July and August of 1920 he tried to get you to go into a contract with the Federal Coal Company to let them have coal at \$9.00 per ton?

A. Yes.

Q. 4. Did you decline to do it?

A. Yes, sir.

Q. 5. What was the cost of production of the coal in the summer and fall of 1920 in the Tracy City section?

A. We had our mines leased, Mr. Pickens, cost was \$2.85 per ton.

Q. 6. I will ask you whether or not he got a profit out of that over and above the production?

A. Yes, he had to get the mining and hauling out of the \$2.85.

Q. 7. And then got his profit?

A. Yes.

Q. 8. Where was the Federal Coal Company to ship this coal they tried to get; this coal in July and August?

A. South Carolina, and the reason I refused to ship it to South [fol. 194] Carolina, we were small, and Staubb Coal Company was a side issue with me; we had a contract with the Tennessee Railroad, I went to Mr. Ward and asked him if he would release some of the contract coal, he said "Werner, you have been honest with us from the lumber standpoint, I will do anything I can, if you will make me one promise,—If you sell coal, not to sell it off our road, because if our cars get away we will not get them back"; I promised, and I gave instructions not to ship off that line. Along in August I met Mr. Latimer and he said Werner have you got any surplus coal, if you have, give it to Chrosniak. I sold them three cars. I told him I didn't look after the selling of the coal but I thought we could spare three cars that week. Sometime in July or August we happen to have a car or so and they asked me to call the Federal Coal Company and see if they wanted it. I called Mr. Thompson and he said yes ship it on. So a little later on Mr. Chrosniak came down to the mill and wanted a contract. I said I don't care to contract the coal, I had too little, and furthermore the prices were going bigger, if I made a contract when the price is high you will take the coal and when it goes down you will stop taking it, I had rather take a chance on it. Later I saw him and he said Werner, I have an attractive price if you want to make a contract, I will get you \$9.00

[fol. 195] for four months. I said no, because my ears will get away, I told Mr. Ward I would not ship off this line.

Cross-examination.

By C. C. Moore:

Q. 1. Mr. Werner, your Company, the Staubb Coal Company entered into a contract with Mr. Flanagan with respect to the operation of these mines, did you not?

A. Not that I know of.

Q. 2. The Staubb Coal Company never made any contract with Flanagan about the operation of the mines as far as you know?

A. Yes, he leased a part of our "Q" mines.

Q. 3. About how much coal was produced at each of the mines?

A. The "Q" mines would produce about 75 or 80 tons a day.

Q. 4. And yours would produce what?

A. Ours was not hardly that much at the time, we were just opening up, we got 100 tons after that.

Q. 5. The contract you made with Mr. Flanagan, your Company has since charged that he breached and failed to comply with that contract, has it not?

A. Not that I know of; as far as that part of the business my son James K. and Dr. Hambree handle that particular business.

[fol. 196] Q. 6. You then don't know of an arrangement by which the claim for damages of the Staub Coal Company is to be settled out of any recovery Mr. Flanagan may get in this case?

A. No, sir.

Q. 7. Do you mean if there was such an arrangement you would know of it?

A. I suppose I ought to.

Q. 8. You never heard of anything of that kind?

A. We had no contract with Mr. Flanagan along that line at all that I know of.

Q. 9. And of there were any such thing as that, you would know about it, being the President of the Company?

A. Naturally ought to.

And further this Deponent saith not.

— — —, by Bessie M. Gorman, Stenog.

Sworn to before me this the 7th day of April, 1922. —
—, Notary Public.

Next Witness, C. H. GARNER, being duly Sworn, deposed as follows:

Direct examination,

By Judge J. J. Lynch:

Q. 1. How long have you been practicing law?

A. Twenty-five odd years.

Q. 2. Where do you practice law?

A. In Tracy City, Grundy County.

[fol. 197] Q. 3. I will ask you whether or not you are the attorney for the Tracy City Coal Company and if so, how long you have been attorney for that Company?

A. Yes, I am attorney for them, and have been for several years. I don't recall the exact time when I first became the attorney for that Company.

Q. 4. Were you attorney for the Company in the year 1920?

A. Yes.

Q. 5. Were you on a regular salary?

A. Yes, sir.

Q. 6. Who paid that salary?

A. Tracy City Coal Company.

Q. 7. Who was the President?

A. At that time Mr. J. C. Beesley of Murfreesboro.

Q. 8. Did he remain President up until the time he sold his interest?

A. I think so.

Q. 9. I will ask you whether or not after the contract of April 12th, 1920, had been discussed and entered into between the Tracy City Coal Company and the Chattanooga Coal Company, you learned that this contract had been assigned to the Federal Coal Company, and if so about when, and from whom?

A. I got the information sometime prior to the time the contract, which was not signed was drawn in my office by Mr. Joe Thompson, which I think is filed as Exhibit No. 1 to Mr. Chrosniak's deposition. [fol. 198] Q. 10. You mean Mr. Chrosniak's re-examination a few days ago?

A. Yes, I got the information several weeks before that. This contract was submitted to me as the Attorney for the Tracy City Coal Company, and I was asked to render an opinion as to whether or not the Federal Coal Company, the alleged assignee of the Chattanooga Coal Company could recover on this contract of the Tracy City Coal Company.

Q. 11. What did you advise the officers of the Tracy City Coal Company on that point?

A. I advised that I was of the opinion that this contract was not assignable, and if assigned by the Chattanooga Coal Company to the Federal Coal Company, without the consent of the Tracy City Coal Company, that it could not be enforced, by the Federal Coal Company against the Tracy City Coal Company, and gave my reasons for so holding.

Q. 12. Now, Mr. Garner, I will ask you if you remember the various conferences held at the time Mr. Joe Thompson, Mr. Beesley and Mr. Bates and others were at Tracy City in reference to contracts filed by Mr. Chrosniak, I mean the unsigned contracts?

A. I remember the occasion when this contract filed as Exhibit No. 1 to the deposition of Mr. Chrosniak, was written in my office. The parties came into my office; they had had a conference that day

prior to coming to my office and had agreed on the terms of a ten-[fol. 199] tative contract, and they came into my office to prepare the contract.

Q. 13. I will ask you if on that occasion, or on any other occasion, or at any other time, you ever heard it suggested by Mr. Flanagan, Mr. Beesley, or anyone representing the Tracy City Coal Company, or any one else, that the Tracy City Coal Company was insolvent, or that it was unable to meet the obligations of that contract, or that it was in danger of bankruptcy?

A. Never heard such a thing discussed or suggested.

Q. 14. I will ask you if you ever heard it suggested until the last two or three days when the question was raised by the defendants and the amended pleadings in this case?

A. That was the first time.

Q. 15. I will ask you if you ever heard the question made by any Officer of the Tracy City Coal Company or any one else that Mr. Flanagan instead of the Tracy City Coal Company was liable for this contract with the Chattanooga Coal Company?

A. No, I never did. I just assumed that the contract on its face was between the two Companies, Tracy City Coal Company and the Chattanooga Coal Company, and of course I had no intimation or idea Mr. Flanagan was claimed to be interested in it personally except as a stockholder.

Q. 16. I will ask you if it was ever claimed by any officer of the Tracy City Coal Company, that the contract of the Tracy City Coal [fol. 200] with the Chattanooga Coal Company made Mr. Flanagan liable for that contract or the breach of the contract?

A. No, I never heard that claimed by anyone.

Q. 17. As the attorney for the Tracy City Coal Company, did you ever make any such instance as that?

A. No, sir.

Q. 18. Were you on a salary at that time for Mr. Flanagan personally?

A. No, sir, I didn't represent Mr. Flanagan in this case, and I had no retainer's fee to represent him, and he was left free to employ whoever he wanted.

Q. 19. Your obligation was the Tracy City Coal Company?

A. Yes.

Cross-examination waived.

And further this deponent saith not.

— — —, by Bessie M. Gorman, Stenog.

Sworn to before me this the — day of April 1922. —

—, Notary Public.

[fol. 201]

April 13th, 1922.

Next witness, R. L. LATIMER, after being duly sworn, deposed as follows:

Direct examination.

By Judge J. J. Lynch:

Q. 1. What position do you hold with the N. C. & St. L. Railway Co., and how long have you held that position?

A. I am Fuel Inspector, and have held that position about five years.

Q. 2. I will ask you if you were Fuel Inspector in 1920?

A. Yes.

Q. 3. I will ask you if during that year you had a contract for the Railroad with the Tracy City Coal Company?

A. Yes, sir.

Q. 4. Do you remember sometime during the spring or summer of 1920 that there was a washout that kept the Tracy City Coal Company from shipping coal for about three weeks?

A. Yes, sir.

Q. 5. I will ask you whether or not after that was over, if you demanded of them that they make up on your contract for the coal they failed to ship during that three weeks?

A. Yes, we pressed them very hard.

Q. 6. I will ask you whether or not at one time you and Mr. Flanagan called on Mr. Bates about the matter, and if so explain what occurred?

A. I went up to Mr. Flanagan's office and we were short on coal, [fol. 202] and told him we wanted his output that day. He told me "I have got to ship the Chattanooga Coal Company some coal;" said "I have got a contract with them, I have got to ship them some coal, but if they will agree to let you have this coal it is alright with me." So he called Mr. Bates and talked to him and then I talked to Mr. Bates. I told him we were up against it and we needed the coal and almost had to have it to run the road. He said well if you can't get the coal to run your engines, I know I can't get any coal out of the Tracy City field, and we will let you have the output today, and he did.

Q. 7. Do you know how many cars that was?

A. No, I don't remember.

Q. 8. Did you assume that you were talking to Mr. Bates?

A. Yes, sir.

Q. 9. And Mr. Flanagan had called for Mr. Bates in your presence?

A. Yes, Mr. Flanagan had talked to him while I was in his office, and he passed the telephone over to me.

Q. 10. And you and Mr. Flanagan both assumed you were talking to Mr. Bates?

A. Yes, sir.

Cross-examination.

By C. C. Moore:

Q. 1. At the time of that conversation, had you met or did you personally know Mr. Bates?

[fol. 203] I don't think I had ever met Mr. Bates, I met him either before or right after that. I don't remember which it was, there was a bunch of Brokers that stayed in the Tracy City field and I don't remember whether it was before or after I met him.

Q. 2. Anyway, it was the Mr. Bates of the Chattanooga Coal Company that you talked to?

A. Yes, sir.

Q. 3. Did you talk on any other occasion besides this?

A. I don't remember that I did.

Q. 4. Did he consent to release any more than the shipment of that one day?

A. No, only that shipment.

Q. 5. Approximately what would that have been?

A. Well, I suppose that Mr. Flanagan was getting out something like 9 or 10 cars a day. I don't remember just what he was going to ship Mr. Bates that day, but we were fighting for coal to keep our head above water, and he agreed to let us have the tonnage that was coming to him that day.

Q. 6. And as you remember now it was the output for that day?

A. Yes, sir.

Q. 7. And that output was approximately 8 or 10 cars a day?

A. As well as I remember, yes, sir.

Q. 8. Give just as nearly as possible the conversation that took place?

A. I think I remember pretty well. Mr. Flanagan, I was in his office, and John talked to Mr. Bates and told him the Inspector was [fol. 204] in the office and was wanting the output of the mines that day, and told him if he could possibly let me have it he would appreciate it; said I will let you talk to him, and he passed the phone over to me, and I told him we had 100 cars of coal to move and it was necessary that we get this coal today if we didn't we would have to confiscate it. Mr. Bates told me "I understand it thoroughly, if you can't get coal to run your engines I can't get any coal from up there, and I will agree to let you have it. That is as near as I remember.

Re-examination.

By J. J. Lynch:

Q. 1. I will ask you whether or not your contract with the Tracy City Coal Company was at a cheap price, if so state about what price it was, if you remember?

A. I believe as well as I remember that it was \$3.50 or possibly \$3.70.

Q. 2. I will ask you if the Tracy City Coal Company filled this contract at this price during the high prices?

A. They lived right up to it.

And further this deponent saith not.

— — —, By Bessie M. Gorman, Stenog.

Sworn to before me this the — day of April 1922. — —
— — —, Notary Public.

[fol. 205]

April 7th, 1922.

Next witness, JOHN CHROSNIAK, being recalled for further cross-examination, deposed as follows:

Cross-examination.

By Judge J. J. Lynch:

Q. 1. You were very emphatic in your testimony a few days ago in denying having received compensation from Mr. Isaac Roberts, with reference to a coal deal?

A. Yes, sir.

Q. 2. Did he give you any compensation?

A. He did but it was not for any coal, Mr. Lynch.

Q. 3. What did he give you compensation for?

A. For services rendered on a different matter; does not dwell with this case.

Q. 4. What services did you render him that he gave you these checks for?

A. I could not say exactly what it was, but it was not coal, Mr. Lynch.

Q. 5. What could it have been if it was not for coal?

A. I don't know exactly how to express it, but it was not commission for coal.

Q. 6. You were not in his employe were you?

A. No.

Q. 7. You were in the employe of the people who were buying from him?

A. Absolutely.

Q. 8. And they were paying you for your services?

A. Yes, sir.

Q. 9. In what way then, should Mr. Roberts pay you money?

A. I handled some for him on the outside, which has nothing to [fol. 206] do with this case whatever.

Q. 10. What matters did you handle for him on the outside?

A. I think I have some correspondence on that somewhere, if I have I will produce it.

Q. 11. Can you remember what it was you were doing that he was paying you these checks for?

A. There was only one check that was paid me.

Q. 12. Who paid you that?

A. Isaac Roberts.

Q. 13. How much was it for?

A. \$250.00 I believe.

Q. 14. Didn't Isaac Roberts pay you a lot of small checks?

A. No, sir, I don't think so.

Q. 15. What Bank did you do your banking with?

A. First National.

Q. 16. You did your business at the First National instead of the Hamilton National?

A. I did at that time.

Q. 17. Did you explain to Mr. Thompson that you got this \$250.00 check?

A. No, sir, it had nothing to do with coal, and therefore it was my personal business.

Q. 18. So it had nothing to do with coal?

A. No, sir.

Q. 19. You say you only got the one check?

A. As near as I can remember that is all. I think the whole thing was \$250.00.

Q. 20. I hand you a check dated July 1920, made payable to you, signed Isaac Roberts, for \$29.30, and ask you if you got that check and cashed it?

[fol. 207] A. Yes, sir.

Q. 21. What was that for?

A. That was on that deal.

Q. 22. What deal?

A. That I was just talking about.

Q. 23. I notice it says here "for 717 and 719" what does that mean?

A. I could not say.

Q. 24. Will you file that as Exhibit 30 to your cross-examination?

A. Yes, sir.

Exhibit 30.

Q. 25. I hand you check dated August 3rd, 1920, for \$1631, I will ask you if you got that check, and if so will you file it as Exhibit 31 to your cross-examination?

A. Yes, sir.

Exhibit 31.

Q. 26. What was that for?

A. You have got me; that is in reference to the same thing. If you put all those together I think it will be \$250.00.

Q. 27. I notice down in the corner it says "for 218 45 at 5, and 215 6 at 2.50" what does that mean?

A. You have got me.

Q. 28. Was that your commission on the coal I just asked you about the other day?

A. That was no commission, he probably marked that off as commission or something, but it was no commission.

Q. 29. I hand you herewith another check dated July 20th, 1920 for \$23.00 signed by I. H. Roberts, and ask you if you will file that [fol. 208] to your cross-examination as Exhibit No. 32, and if you got that check?

A. Yes, my signature is on the back.

Exhibit 32.

Q. 30. Can you explain what that is for?

A. Must be in connection with that other, I thought I received one check.

Q. 31. It says "for 4 Dixie" what does that mean?

A. I don't know.

Q. 32. Can you explain that?

A. No, sir.

Q. 33. I hand you another check dated June 24th for \$43.40 signed I. H. Roberts. I will ask you if you got that check and if you will file it as Exhibit No. 33, and ask you to explain what that was for?

A. I don't know, except that other thing.

Exhibit 33.

Q. 34. What do you mean by the other thing?

A. That same thing, I was talking to you about, about that side deal.

Q. 35. What was the side deal, can you tell us?

A. No, not without looking up the correspondence on it. I think I have something on it.

Q. 36. You say Mr. Isaac Roberts gave you a check for \$250.00 besides all these?

A. No, I think the whole thing was \$250.00, I believe if you add those up it will make \$250.00.

Q. 37. I will ask you if you didn't have a transaction with E. B. Roberts and he gave you a check for \$250.00 to secure your influence in getting cancelled the contract with the Federal Coal Company at \$4.00, and if you didn't use your influence and get it cancelled, and [fol. 209] if he didn't give you a check for \$250.00?

A. I don't know about that \$250.00, I thought it was \$250.00 in there some way. Mr. Lunsford told me if we wanted any more coal from the Tennessee Consolidated Coal Company for me to take it up with Mr. Thompson and cancel that contract, which we did.

Q. 38. You used your influence with Mr. Thompson and got it cancelled?

A. Yes.

Q. 39. Did you tell Mr. Thompson you were getting \$250.00 to use your influence?

A. No, sir, there was no money consideration mentioned when the matter of cancellation of contract was made.

Q. 40. I had you herewith check for \$250.00 signed by E. R. Roberts, or Dixie Coal & Iron Company by E. R. Roberts, Secretary & Treasurer, dated on the 10th day of July 1920, and ask you if you

received that check, and if you will file it as Exhibit 34 to your deposition?

A. I guess that is right, I endorsed it.

Exhibit 34.

Q. 41. I will ask you if that check was not given you out of consideration of your using your influence in getting that contract cancelled?

A. It was given me but there was no amount specified and no money mentioned until the contract was cancelled, Mr. Roberts said inasmuch as I helped him out on that, he was going to give me something.

Q. 42. Did Mr. E. R. Thompson know anything about that until just now?

A. No, sir.

[fol. 210] Q. 43. You never told him?

A. No, sir.

Q. 44. You never told him when you denounced this as a damn lie, about these various checks?

A. No, sir, because it was no commission.

Q. 45. I will ask you if you didn't tell him if he would give you this money you would get the contract cancelled, and keep them on a high market and pay them a high price?

A. No, sir.

Q. 46. And if you didn't carry that out?

A. No, sir, I don't think we got over 10 cars from the Dixie Coal & Iron Company.

And further this deponent saith not.

Signature Waived. Deposition Previously Sworn to.

Next witness, E. B. ROBERTS, after being duly sworn, deposed as follows:

Direct examination,

By J. J. Lynch:

Q. 1. Mr. Roberts, what connection have you with the Dixie Coal & Iron Company?

A. General Manager.

Q. 2. I hand you herewith a check for \$250.00, dated 10th day of July 1920, payable to John Chrosniak, signed by you as Secretary & Treasurer of the Dixie Coal & Iron Company and filed as Exhibit 34 to the cross-examination of John Chrosniak, and ask you if you signed that check and if so what it was for, and explain all about it?

[fol. 211] A. I signed the check referred to above, and Mr. Chrosniak told me that he thought it would be to the Dixie Coal & Iron Company's advantage, and possibly the Federal Coal Company's ad-

vantage, that a contract that we had with the Federal Coal Company at this time, be cancelled, and he promised to do what he could to get this contract cancelled, and promised to keep us in line on the market price. I told him I would give him advantage of what surplus coal our Company mined and what I might buy on the outside market, and he intimated that he should receive a little something for this and I sent him this check for \$250.00.

Q. 3. I will ask you if you look at the body of the check and say if it was written by Mr. Chrosniak himself?

A. No, sir, I wrote that.

Q. 4. I hand you herewith Exhibit 30, 31, 32, 33 and 34 to the cross-examination of Mr. Chrosniak and ask you whether or not you wrote those checks; the body seems to be in the same handwriting and John Chrosniak seems to be in the same handwriting?

A. My elder brother wrote those checks, and I knew nothing of them at the time.

Q. 5. The name John Chrosniak seems to have been the same?

A. We both print alike.

Q. 6. You don't know what these were for?

A. No, sir.

Cross-examination.

By C. C. Moore:

[fol. 212] Q. 1. Mr. Roberts, at the time you entered into this agreement with Mr. Chrosniak for the cancellation of that contract, what was your position with the Dixie Coal & Iron Company?

A. I was General Manager.

Q. 2. And also Secretary & Treasurer?

A. Secretary & Assistant Treasurer.

Q. 3. The check is signed Secretary & Treasurer, that should be Assistant Treasurer?

A. Yes, sir.

Q. 4. And you were the active executive officer of the Company in charge of its operations at that time?

A. Yes, sir.

Q. 5. How much was this contract between the Federal Coal Company and the Dixie Coal & Iron Company that you were seeking to have cancelled?

A. You mean the amount of tonnage, or price?

Q. 6. Amount of tonnage and price?

A. The amount of tonnage was to include all coal that we mined exclusive of that given the N. & C. Railroad and the price was \$4.00 per ton.

Q. 7. And for how long a period of time did that contract run?

A. Six months I believe.

Q. 8. And this cancellation took place about the first of July, did it not?

A. I don't remember the exact date of the cancellation. When Mr. Chrosniak mentioned this to me it seemed to me that he said

something about Mr. Thompson being willing to cancel this contract [fol. 213] or that something along this line had been done.

Q. 9. Now the check is dated 7/10/20, which I understand to mean July 10th, 1920. Was this check given before or after Mr. Chrosniak had rendered this service in securing the cancellation of the contract?

A. I do not *not* exactly what services Mr. Chrosniak rendered, but believe the check was given after the contract had been cancelled.

Q. 10. Approximately how soon afterwards, would be your recollection now?

A. I do not know.

Q. 11. Was it a short or considerable period of time?

A. I am not positive whether the check was given before or after the cancellation was agreed upon.

Q. 12. And you can't be sure how near it was to the time of the cancellation?

A. No, sir, not at this time.

Q. 13. Was it a written contract?

A. Yes, sir.

Q. 14. Was it in duplicate, did your Company have a copy of the Federal Coal Company contract?

A. Yes.

Q. 15. How was the cancellation consummated; how did you carry out the cancellation?

A. Mr. Thompson, I believe, wrote us a letter stating he was willing to cancel the contract if it was satisfactory to us.

Q. 16. That was after you and Mr. Chrosniak had had this understanding by which he was to use his influence in securing [fol. 214] the cancellation?

A. I don't remember.

Q. 17. If you know the time you and Mr. Chrosniak talked about it, as you have outlined, you know whether Thompson had written then about the cancellation?

A. No, sir, I had not received Mr. Thompson's letter at that time.

Q. 18. When you issued this check you did it in payment of service you had understood and then believed Mr. Chrosniak had rendered in securing the cancellation of that contract, that was what you were paying for?

A. No, sir, not altogether. I don't know whether Mr. Chrosniak had rendered any services in getting this contract cancelled.

Q. 19. But he had agreed to render them and then claimed he had?

A. He agreed to render them but I don't remember of him having claimed he rendered any service.

Q. 20. But you say he intimated to you he ought to be paid; was that intimation before or afterwards; that was a part of that first agreement, wasn't it?

A. I don't believe any pay was mentioned at that time.

Q. 21. When was the pay mentioned in connection with the transaction?

A. Mr. Chrosniak was at Tracy City so often that I do not remember the exact time.

Q. 22. But it was mentioned before you finally got the contract cancelled?

A. Yes, sir.

[fol. 215] Q. 23. And when he mentioned it you agreed to pay him?

A. I agreed to give Mr. Chrosniak some money, I don't believe the amount was mentioned, and he was to keep us in line on the coal prices.

Q. 24. By that do you mean he was to pay you a higher price for the coal he bought from you for the Federal Coal Company; was that part of the understanding?

A. No, sir, he never agreed to pay me an excess price for coal for the Federal Coal Company.

Q. 25. What do you mean when you say he was to keep you in line on coal prices?

A. I understood from his conversation that he meant the top market price prevailing at that time.

Q. 26. And did he carry out that agreement to pay you at top prices for coal he bought from you for the Federal Coal Company afterwards?

A. I suppose he did.

Q. 27. You think he did?

A. Yes, sir.

Q. 28. Did you sell much or little coal to the Federal Coal Company after that?

A. Quite a bit I believe.

Q. 29. And at prices ranging from \$7.00 to \$10.00 a ton?

A. Yes, sir.

Q. 30. What, if anything, did your Company give to the Federal Coal Company in exchange for their agreement to cancel this contract?

A. Not anything as I remember.

Q. 31. Do you know what line of argument Chrosniak was going to use with the Federal Coal Company to get it cancelled; did he [fol. 216] explain that to you?

A. No, sir, he did not.

Q. 32. Did he give you any reason why he thought he would be able to get it cancelled?

A. No, sir.

Q. 33. He merely undertook to secure a cancellation for you and you agreed to pay him if he would do it?

A. No, sir, I didn't agree to pay him for the cancellation alone.

Q. 34. No, he was not only to get it cancelled, but he was thereafter to pay you a high price for the coal he was to buy from you?

A. He promised to use his efforts to get the contract cancelled, and as I remember claiming that both Companies would profit by it, and I told him I would favor him on what coal I could buy from other producers.

Q. 35. Did he try to explain to you at all how the Federal Coal

Company could profit by canceling a contract at \$1.00 and then paying \$7.00 to \$10.00 for coal?

A. No, sir.

Q. 36. And you could think of no way how they could profit?

A. No, sir.

Q. 37. This six months contract, about how long did it have to run at that time?

A. I have forgotten the exact date of the cancellation, but believe the contract was dated April 20th, 1920.

Q. 38. An extended six months from that date, of April 20th.?

[fol. 217] A. Yes, sir.

Q. 39. Had deliveries been made according to the terms of the contract up to the time of the cancellation or were you then somewhat behind?

A. As I remember they had.

Q. 40. About what was your output at that time?

A. About 2,000 tons per month, I believe.

Q. 41. About what was your Railroad commitment?

A. The Railroad claimed I was to furnish them three cars of coal per day, or about 150 tons per day; as I understood the agreement I was to furnish one to two cars a day. We had no written contract with the Railroad during this period, nothing more than a verbal agreement.

Q. 42. Now, in this contract that you cancelled, you say that it covered all of your coal except your commitment to the Railroad. That as I understand was, one to two or three cars, according to your respective contentions, per day. About how much would that leave for delivery under the contract?

A. Three cars per day was more than we were producing at that time, and one car per day would leave about 600 tons in excess.

Q. 43. That is, 600 tons a month?

A. Yes, sir.

Q. 44. About what did you actually deliver to the Railroad during that period under your Railroad contract?

A. We delivered considerably over 1,000 tons per month, but have forgotten the exact tonnage.

Q. 45. You delivered less than an average of 2 cars a day, [fol. 218] however?

A. Yes, sir, I believe so. There was some coal being tipped over our tip-ple, as owned by the Sewance Fuel & Iron Company. I bought this coal from them and shipped it and didn't consider that covered by any contract.

Q. 46. Of the coal covered by this contract, with the Railroad exception, of its actual operations, you delivered about half of that to the Railroad and sold the other half, that is approximately correct, is it not?

A. No, sir, I delivered to the Railroad more than half of my tonnage during this period.

Q. 47. Much or little more than half, what would be your estimate?

A. Much I should think.

Q. 48. Give approximately the percentage?

A. Possibly two-thirds.

And further this deponent saith not.

Signature waived. E. B. Roberts.

Sworn to before me this the — day of April, 1922. — — —,
Notary Public.

April 15th, 1922.

Next witness, Miss IRENE SANSON, being duly sworn, deposed as follows:

Direct examination.

By Judge J. J. Lynch:

[fol. 219] Q. 1. Where do you live?

A. Tracy City.

Q. 2. I will ask you if you were in the employe of Mr. John D. Flanagan in the year 1920 at Tracy City?

A. Yes, sir.

Q. 3. I will ask you if during the months of September, October and November you remember Mr. Flanagan calling up the officers or agents of the Federal Coal Company at Chattanooga?

A. Yes, I do.

Q. 4. I mean over long distance?

A. Long distance.

Q. 5. Were these calls frequent or otherwise?

A. They were frequent.

Q. 6. About how frequent were they?

A. Well, practically every other day, something like that.

Q. 7. Through what months did this continue?

A. September, October and November.

Q. 8. How far into December?

A. The best I remember about the middle of December.

Q. 9. I will ask you what Mr. Flanagan called these gentlemen up for?

A. To see if they would take coal on their contract.

Q. 10. Did you hear him talking to th-m?

A. Yes, sir.

Q. 11. I will ask you whether or not in these conversations, during the time mentioned, Mr. Flanagan was urging the officers of the Federal Coal Company to take coal under this contract?

[fol. 220] A. He was.

Q. 12. I will ask you whether or not about the middle of December you understood from Mr. Flanagan that in one of these conversations they had absolutely declined to take any more local?

A. Yes, the best I remember that is true.

Q. 13. I will ask you whether or not up to that time, you understood they had been promising from time to time to take the coal?

A. Yes.

Q. 14. Do you remember what officer of the Federal Coal Company Mr. Flanagan would most frequently call for?

A. Mr. Thompson.

Cross-examination.

By C. C. Moore:

Q. 1. You don't know who talked from the Chattanooga end, I judge?

A. No, I don't.

Q. 2. Now, would these conversations you refer to, be of practically the same import all the time?

A. Yes.

Q. 3. Can you state in substance, as you now remember, what was said by Mr. Flanagan from his end of the line?

A. Not just what he said. I don't remember all; I know he called for the orders.

Q. 4. You have a remembrance now that he did call and ask for shipping instructions about sending on coal?

A. Yes.

[fol. 221] Q. 5. And that is the substance of what you heard?

A. Yes.

Q. 6. What was said at the other end of the line, of course, you don't know now and didn't know at the time?

A. No, sir.

Q. 7. How long were you in Mr. Flanagan's employe, Miss Sanson?

A. Four years.

Q. 8. And you are not in his employe now?

A. No.

Q. 9. The Exhibit that Mr. Flanagan has filed here shows that for the months of November, and possibly part of December, the system of records is different. Do you remember the fact that the system of shipments of coal was changed; that is, the records?

A. Yes, I remember November was on a different sheet from the others.

Q. 10. Was that put on there at the time or was it subsequently re-written and changed?

A. The best I remember that was written, all the November record was written on that sheet.

Q. 11. And when was that done, was it originally written, as had been the previous months or subsequently a new record made up and the original one discarded or destroyed?

A. The best I remember that was the original.

Q. 12. Did you yourself as a part of your duties in the office, make the entries on these records?

A. Yes.

[fol. 222] Q. 13. You have seen that record, I believe, since it was filed here?

A. I think Mr. Fults had that up home, the latter part of last week.

Q. 14. The Exhibit which I now show you was shown you by Mr. J. D. Fults a few days ago, I believe?

A. Yes.

Q. 15. Look to this Exhibit and that part of it covering the month of November, and say, after looking it over, if it is your best recollection that is the original as made from day to day?

A. It seems to me that is the original.

Q. 16. Why was this month of November kept different from the preceding months?

A. That was Mr. Flanagan's instructions to me, I don't know why.

Q. 17. Then do you know why December was kept substantially as before the preceding months?

A. No, that was according to his instructions.

Q. 18. You have no recollection of having transcribed November in the early part of December, then destroying the November records?

A. No.

Q. 19. If that had been done in the office, would you have remembered, you think?

A. I think I should have.

Q. 20. Whose hand-writing is this November sheet in, as shown you there?

A. Mine.

Q. 21. All in your handwriting?

A. Yes.

[fol. 223] Q. 22. Whose handwriting are the preceding months?

A. I think they are all mine; Mr. Flanagan did some of this; this is all my handwriting and some of it Mr. Flanagan's.

Q. 23. Look to the sheets for December and say in whose handwriting they are?

A. That is all my handwriting.

Q. 24. December is entirely in your handwriting?

A. Yes.

Q. 25. Do you recognize those December sheets as original?

A. Yes.

Q. 26. How many records of shipments of coal were kept in that office besides this one?

A. Do you mean this same Company; do you mean were there more than one record like this month?

Q. 27. What I meant to inquire is, whether there were other records kept in that office of coal being shipped out and sold to customers, whether for Mr. Flanagan individually or any other person or concern?

A. I kept all the record for the Campbell Branch Coal Company, that was the only records I kept for the Campbell Branch Coal Company.

Q. 28. And this record that you hold in your hand for whom was it kept?

A. This was kept for Mr. Flanagan.

Q. 29. Mr. Flanagan individually or as an officer of some Company which?

A. This was kept, the best I remember, in connection with the Campbell Branch Coal Company.

Q. 30. Then it is your recollection that all the records of the [fol. 224] coal shipments were in connection with the Campbell Branch Coal Company?

A. All that I handled.

Q. 31. Did any one else handle any in the office besides yourself?

A. No.

Q. 32. Were any books or records kept in that office for the Tracy City Coal Company?

A. Mr. Beesley kept records for the Tracy City Coal Company.

Q. 33. Were they kept in that office?

A. No, sir.

Q. 34. Then there were no records kept in that office for the Tracy City Coal Company?

A. I don't know, all I know was for the Campbell Branch Coal Company, if there were any other records there I don't know anything about it.

Q. 35. Were you there in April and May of 1920?

A. Yes, sir.

Q. 36. Did you have knowledge of coal that was being shipped by the Chattanooga Coal Company?

A. I don't remember.

Q. 37. Didn't you have knowledge of who the coal was being shipped to, in the office, as shipments were made?

A. Yes.

Q. 38. It was the practice of the office to keep a record of the coal that was shipped out?

A. Yes.

Q. 39. And that record you kept?

A. Yes, sir.

Q. 40. You don't remember who coal was shipped to along about that time, whether Chattanooga Coal Company or some one [fol. 225] else?

A. I don't know.

Q. 41. And when you say you don't remember about that, you, as I understand, are not meaning to say it was not done, but you don't recall to whom it was shipped?

A. That's it, I don't recall to whom this coal was shipped to.

Q. 42. Had the record that was being kept of April and May, which you will observe is the two months preceding the month you wrote, was it also kept on similar sheets to those?

A. I don't remember that.

Q. 43. About what was the output of the Campbell Branch Coal Company during that season?

A. I don't remember.

Q. 44. Who sold coal from these Campbell Branch mines during that season?

A. Mr. Flanagan.

Q. 45. Did you have any knowledge of what properties was owned by the Tracy City Coal Company and leased by Mr. Flanagan?

A. No, sir.

Q. 46. You don't know then whether that was the same property that the Campbell Branch was operating?

A. No.

Q. 47. Didn't Mr. Beesley sell some of this Campbell Branch Coal?

A. If he did I don't remember anything about it.

[fol. 226] Q. 48. So far as you know he didn't?

A. No.

Q. 49. Who in the office attended to the shipment of coal to the various customers?

A. Mr. Flanagan.

Q. 50. Who besides yourself was employed in the office?

A. I was the only one who was employed to do the office work.

Q. 51. The office work was done by Mr. Flanagan and by yourself?

A. Yes, sir.

Q. 52. You were regularly in the office all the time?

A. Yes, sir.

Q. 53. Mr. Flanagan, I judge, was in the office quite a good deal when not somewhere else on business?

A. Yes.

Re-examination.

By Judge J. J. Lynch:

Q. 1. What business are you engaged in now?

A. I am teaching.

Q. 2. In High School?

A. Yes.

Q. 3. At Tracy City?

A. Yes, sir.

Q. 4. It has been about a year since you have been in Mr. Flanagan's employ?

A. Yes, approximately a year.

Q. 5. As far as you know, was there any effort in the manner in which your books were kept to conceal any fact?

[fol. 227] A. No, sir.

Q. 6. I will ask you if during the four years you were in Mr. Flanagan's employ he ever asked you to make a false entry or do anything improper in the keeping of his books?

A. No, sir, he certainly did not.

And further this deponent saith not.

Signature waived. Miss Irene Sanson.

Sworn to before me this the — day of April 1922. —
—, Notary Public.

TESTIMONY OF T. B. RODDY (Stipulated)

Agreement by Counsel

In lieu of taking the testimony of T. B. Roddy, Deputy Clerk of the County Court of Grundy County, it is stipulated that said T. B. Roddy if called as a witness, would testify, and that such are the facts, that the license for exercising the privilege as Coal Broker filed in this case were applied for by John D. Flanagan and Mr. Roddy by mistake omitted to include the word "Mountain in the license as issued, and that later, on the next day, or shortly thereafter, when the matter was called to his attention, he inserted the [fol. 228] word "Mountain" in the license, which is filed as an Exhibit to Mr. Flanagan's deposition.

It is further stipulated that witness would testify, and such is the fact, that the amount of \$12.50 recited in this license, is all the taxes that was paid by John D. Flanagan to the County Court Clerk of Grundy County for exercising the privilege of coal dealer or Broker during the year 1920.

The witness would further state that he omitted to correct his records by adding the word "Mountain," as above set out until very recently.

Next witness, JOHN D. FLANAGAN, being recalled for re-examination, deposed as follows:

Direct examination.

By Judge J. J. Lynch:

Q. 1. The time you entered into the contract sued on in this case, did you know that C. M. Preston was interested in the Federal Coal Company?

A. No.

Q. 2. In discussing the matter with Mr. Beesley, did you state to him that you assumed that perhaps Mr. Preston must be interested in the Chattanooga Coal Company?

A. That was my idea of it, and I expressed to him; I didn't know there was such a concern as the Federal Coal Company.
[fol. 229] Q. 3. You mean at that time?

A. Yes, at that time.

Q. 4. Have you been back to your office at Tracy City since Mr. Beesley was examined?

A. No, sir.

Q. 5. Will you make search and see if you can find among the cancelled checks of the Tracy City Coal Company the checks showing the payment of commission to Mr. Busbee, on the contract between the Tracy City Coal Company, and if you can find them, will you file them as Exhibit 40, etc.?

A. Yes, sir, that includes the U. S. Fuel Corporation, they may have been paid in that name instead of his.

Exhibit 40.

Q. 6. When you were negotiating for the contract that was never consummated in July, that has been referred to, at the time you were negotiating the contract, did you conceal or have any purpose to conceal from the Federal Coal Company the fact that you had a contract with the Tracy City Coal Company?

A. No, sir, I did not, as a matter of fact this contract was made in July, I don't remember how it was brought up and discussed, but it evidently was because it shows on the face of the tentative agreement itself, and it was never at any time kept a secret, it was public property.

Q. 7. You mean by it being public property it was known in Tracy City?

A. Absolutely, by every one.

Q. 8. Have you any individual recollection of having had a discussion about it with any of the officers of the Federal Coal Company?

A. No.

Q. 9. I will ask you if you had any conversation with Mr. Chrosniak, Mr. Thompson or any one else with reference to the solvency or insolvency of the Tracy City Coal Company at any time?

A. No, sir, I did not; as a matter of fact, the Tracy City Coal Company was absolutely solvent; it was not a very large Company, \$40,000.00, and the stock was worth par. Of course had they have gotten judgment for say \$500,000.00 or double the amount of the stock, that would have thrown any corporation in the State of Tennessee in bankruptcy, a judgment against any Corporation double the amount of their capital stock, I think would throw pretty nearly any one into bankruptcy. I was solvent, of course, the most of what I owned was tied up on the Tracy City Coal Company stock. Had a judgment of that size been had the chances are it would have wiped us both out of existence.

Q. 10. Speaking of yourself, how much stock did you have at that time, approximately, in the Tracy City Coal Company?

A. It was a minority stock, a \$50,000.00 Company with \$40,000.00 paid in, I don't just remember but it was quite a bit in the minority, under \$20,000.00, between \$15,000.00 and \$20,000.00, under \$20,000.00 and not over \$15,000.00.

[fol. 231] Q. 11. Did you have much property outside of that?

A. No, sir.

Q. 12. Did you have any notice of the assignment of your contract,—the Tracy City Coal Company contract with the Chattanooga Coal Company,—to the Federal Coal Company?

A. I had no notice of it.

Q. 13. When did you learn of it, and from whom?

A. It was quite a while, we had been shipping coal quite a while before I ever realized or heard of who the coal was going to; it was

all shipped and billed to the Chattanooga Coal Company. I had never heard anything else; I, however, finally understood they were selling this coal to the Federal Coal Company, then later on I got some straight information that the contract had been assigned, so I keep inquiring to try to find out the fact about it, whether it was a sale or assignment, and I think that most sure Mr. Thrasher was the first one who gave me the information, he was connected with Mr. Busbee. At that time, I submitted to my attorney and on his advise there was no more coal shipped. I immediately after getting his opinion, took it up with Mr. Beesley over the telephone, later on Mr. Beesley was up at Tracy City and Mr. Garner went over it with Mr. Beesley and myself.

Q. 14. I will ask you if you ever accepted or agreed to the assignment of the Federal Coal Company of that contract?

A. Absolutely not, never billed them a cent on it; never had any [fol. 232] transactions on it; never had any agreement with them about it, as Mr. Chrosniak stated in his deposition, I refused to recognized them.

Q. 15. Mr. Flanagan, are you acquainted with the cost of producing that coal in that field?

A. Yes.

Q. 16. State approximately what it cost to produce coal in the Tracy City field in the autumn of 1920?

A. I think approximately around \$2.00 or \$2.10?

Cross-examination.

By C. C. Moore:

Q. 1. About when, Mr. Flanagan, did you first begin selling coal to the Federal Coal Company on your own individual account?

A. The first coal I sold them, I don't just remember, but I think probably it was in August, maybe little earlier than that, but I don't just remember.

Q. 2. Look to this check and see if that check is a check given you in payment of coal?

A. Yes, sir.

Q. 3. What is the date of that check?

A. May.

Q. 4. May what?

A. May 31st.

Q. 5. 1920?

A. 1920.

Q. 6. That check is a part of an Exhibit to the testimony of Mr. E. R. Thompson in this case, check as referred to being number [fol. 233] 4488; this check by the endorsement on the face of it, shows it is covering invoices rendered to you under dates of May 26th, May 27th, and May 28th, 1920. Have you any records here from which you can verify those dates?

A. There are no other records here except those filed in the case.

Q. 7. You have records, however, I judge, in your office, covering the period back of your Exhibit "L," which begins with June 1st?

A. I imagine so, I imagine I have checks of some kind I could check up as to whether or not those cars were shipped.

Q. 8. Will you look to the record in your office and file a statement showing shipping dates of coal to the Federal Coal Company in the name of the Flanagan Coal Company or any other trade name you used previous to June 1st, 1920?

A. I will.

Statement.

Q. 9. Then you had no personal reason for not selling the Federal Coal Company at least as early as May 1920, in fact, you had no reason for not selling them at all, if you knew you would get the money?

A. As I remember it, to the best of my knowledge and belief, up until after this first contract was made, I had never heard of the Federal Coal Company; I could possibly be mistaken in this but I don't think I am, I think that is a fact. I talked to Mr. Busbee, [fol. 234] our acting Agent in this other matter, who, of course, did not give the Federal Coal Company a good reputation; said they would not live up to what they agreed; was holding up his money, and not knowing the Company I would have been influenced by what he said because I didn't know anything about them.

Q. 10. Did Mr. Busbee also tell you they were suing him for a substantial sum at that time?

A. Yes, sir; Thompson said there was nothing to Busbee and Busbee said there was nothing to Thompson.

Q. 11. And notwithstanding what Mr. Busbee did tell you, you did sell the Federal Coal Company quite a bit of coal?

A. Yes, spot coal, which was all cash coal, approximately so.

Q. 12. So it made no difference to you provided you got your money for it?

A. Well, I don't know about that, those things had to come up and be investigated; as a matter of fact the Chattanooga Coal Company was investigated and they were not satisfactory without additional security. In the coming up of the other, Mr. Busbee was our acting Agent and had this tonnage in his possession and in this particular transaction would have absolutely been governed by his advise, and in fact, we were governed by it.

Q. 13. And made the contract he negotiated?

A. Yes.

Q. 14. But you were not satisfied with Mr. Bates solvency and [fol. 235] required him to give security, and he gave Mr. C. M. Preston?

A. Yes.

Q. 15. And after you had investigated Mr. Preston's solvency you were satisfied with that and thereafter you were satisfied with the contract?

A. Yes, of course, I understood, and even talked to Mr. Busbee,

a few weeks later, or probably a few days later, concerning Mr. Preston, and why Mr. Preston, in his opinion, secured this account; he said he guessed Mr. Preston was getting his; said the Prestons were not around securing accounts for friendship.

Q. 16. Mr. Busbee, of course, knew that Mr. C. M. Preston, was a very large stockholder in the Federal Coal Company; you don't recall whether he told you that fact at the time?

A. No, sir, at the time he didn't tell me anything about the Federal Coal Company. After I found this fact out I talked it over with him; he told me had he known it, he would not have delivered that to the Federal Coal Company. I talked to him about this when I heard the rumor on the street several times, and he said the best he could find out at that time, it was a re-sale.

Q. 17. Mr. Busbee seem- to have considerable animosity toward Mr. Thompson of the Federal Coal Company?

A. Yes, he said he would not live up to his contract as I remember it.

Q. 18. And he accused Busbee of not living up to his contract?

A. Later on, when I talked to Mr. Thompson, that is true.

[fol. 236] And further this deponent saith not.

Signature waived. John D. Flanagan. Previously sworn to.

[fol. 236½] EXHIBIT #30 TO DEPOSITION OF JOHN CHROSNIAK

Tracy City, Tennessee, July 1920.

First National Bank

Pay to the order of J. N. Chrosniak \$29.30 Twenty-nine & 30/100
Dollars.

For 7/17—7/10.

I. H. Roberts.

(Stamped:) First National Bank, Tracy City, Tenn., Paid July 27, 1920. H. J. Bowers, Cashier.

Endorsed: J. N. Chrosniak. J. Chrosniak.

(Stamped:) Pay to the order of any Bank, Banker or Trust Company. (All prior endorsements guaranteed.) July 26, 1920, First National Bank, Chattanooga, Tenn. J. P. Hoskins, Cashier.

EXHIBIT #31 TO DEPOSITION OF JOHN CHROSNIAK

Tracy City, Tenn., Aug. 3rd, 1920.

First National Bank

Pay to the order of John Chrosniak, \$16.31 Sixteen & 31/100 Dollars.

For 218.45@5, 215.6 2 1/2.

Roberts Bros.

(Stamped:) First National Bank, Tracy City, Tenn., Paid Aug. 6, 1920. H. J. Bowers, Cashier.

Endorsed: John Chrosniak.

(Stamped:) Pay to the order of any bank, banker or trust Company. (All prior endorsements guaranteed.) Aug. 4, 1920 First National Bank, Chattanooga, J. P. Hoskins, Cashier.

EXHIBIT #32 TO DEPOSITION OF JOHN CHROSNIAK

Tracy City, Tennessee, July 20, 1920.

First National Bank

Pay to the order of John Chrosniak \$23.00 Twenty-three & 00/100 Dollars.

For-4-Dixie.

I. H. Roberts.

[fol. 237] (Stamped:) Pay to the order of any bank, banker or trust company. (All prior endorsements guaranteed.) July 22, 1920, First National Bank, Chattanooga, Tenn., J. P. Hoskins, Cashier.

EXHIBIT #33 TO DEPOSITION JOHN CHROSNIAK

Tracy City, Tenn., June 24, 1920.

Pay to the order of John Chrosniak \$43.95 Forty-three & 95/100 Dollars.

I. H. Roberts.

(Stamped:) First National Bank, Tracy City, Tenn., Paid July 2, 1920. H. J. Bowers, Cashier.

Endorsed: John Chrosniak.

(Stamped:) Pay to the order of any bank, banker or trust company. (All prior endorsements guaranteed.) July 1, 1920. First National Bank, Chattanooga, Tenn., J. P. Hoskins, Cashier.

EXHIBIT #34 TO DEPOSITION OF JOHN CHROSNIAK

Date	Invoices	Amount
7/10/20	Mining	250.00

First National Bank

Tracy City, Tenn. No. 1343.

Steam Coal

Tracy City, Tenn., 7/10/20.

Pay to the order of John Chrosniak \$250.00.

Dixie Coal & Iron Company, By E. B. Roberts, Sec'y and
Treas.

Upon payee executing in ink the receipt on the back of this voucher, it becomes a check on above bank.

Endorsed: Received the amount mentioned in this Voucher-Check in full settlement of accounts as stated. J. A. Chrosniak, Payee. J. Chrosniak. Make other endorsements below.

(Stamped:) Pay to the order of any bank, banker or trust company. (All prior endorsements guaranteed.) July 13, 1920. First National Bank, Chattanooga, Tennessee, J. P. Hoskins, Cashier. [fol. 238] Depositions of W. T. Thrasher, John Chrosniak, and

E. R. Thompson and W. S. Bates, taken by agreement, in the above-styled causes to be read interchangeably on the trial of each so far as relevant and competent.

It is agreed all the proof taken in either case shall be read on the trial of the other, so far as it is competent and relevant.

W. T. THRASHER, first witness introduced, after being duly sworn, deposed as follows:

Direct examination.

By C. C. Moore:

Q. 1. Mr. Thrasher, you have heretofore given a deposition in the case of Flanagan vs. The Federal Coal Company, have you not?

A. I have.

Q. 2. I will ask you whether or not in April and May of 1920, you were a member of the partnership doing business under the style of Chattanooga Coal Company?

A. I was.

Q. 3. Who was your associate?

A. W. S. Bates.

Q. 4. Did you have any active part in the negotiations of a contract entered into in the name of the Tracy City Coal Company as seller, and the Chattanooga Coal Company as purchaser, of 18,000 tons of coal to be delivered from April 12th 1920 to April 12th 1921, at the rate of 8 cars per week?

A. I think I was out of the City when that contract was made by [fol. 239] my partner, W. S. Bates.

Q. 5. After the contract was made, state whether or not you took any part in trying to get the coal shipped and delivered as provided in the contract?

A. Yes, we made some efforts to get the coal shipped.

Q. 6. State what you did in that respect?

A. I believe we called over the long distance and then I was in Tracy City several times before leaving the Chattanooga Coal Company.

Q. 7. When you were in Tracy City yourself, these several times mentioned, who, if any one, did you talk to on the subject of shipping that coal?

A. Mr. Flanagan.

Q. 8. Mr. John D. Flanagan?

A. Yes, sir.

Q. 9. What would be the substance of these conversations you would have with Mr. Flanagan on that subject?

A. There was a car shortage and the Railroad had a representative over there that was taking the coal, so Mr. Flanagan said, and I know it to be a fact, there was a representative from the Railroad there, Mr. Latimer.

Q. 10. Was that the reasons given you by Mr. Flanagan for the fact that the coal was not being shipped?

A. Yes, sir.

Q. 11. About how many times did you personally call on Mr. [fol. 240] Flanagan to induce him to make shipments?

A. I don't remember, it was several times.

Q. 12. At these several times when you were calling on him, was he delinquent in shipments?

A. Yes, sir.

Q. 13. And your purpose was to get him to do what?

A. To fill the contract to the full extent.

Q. 14. During that time state whether or not Mr. Flanagan told you that that contract in the name of the Tracy City Coal Company was his contract, obligating him personally to deliver the coal?

A. No, sir.

Q. 15. Whose contract was it as represented to you by Mr. Flanagan?

A. Tracy City Coal Company, that was my understanding.

Q. 16. Now, was any question made at all as to the right and authority of T. O. Busbee, as Agent of the Tracy City Coal Company to negotiate and enter into that contract, so far as you heard at that time?

A. No.

Q. 17. Do you know whether or not Mr. Busbee was paid for his services as the Agent in negotiating that contract?

A. Yes, sir, I think he was.

Q. 18. Approximately how much was he paid, Mr. Thrasher?

A. I will not be sure, but I think around \$500.00, something like that.

Q. 19. Who paid him that amount?

[fol. 241] A. Mr. Flanagan, I suppose, or the Tracy City Coal Company.

Q. 20. What time did you sever your connection with the Chattanooga Coal Company?

A. About June first.

Q. 21. Of 1920?

A. Yes, sir.

Q. 22. Before you severed your connection with the Chattanooga Coal Company, and after this contract of April 12th had been entered into, was Mr. Flanagan selling coal on his own account as a Broker, or otherwise, separate and apart from the Tracy City Coal Company?

A. I don't know whether he was prior to the first of June or not, he did sell me some after June 1st; he made contracts, as I understand, with some other operators up there for some of their coal, small wagon mines.

Q. 23. After you severed your connection with the Chattanooga Coal Company, did you continue in the coal business in any connection?

A. Yes, sir.

Q. 24. With whom?

A. U. S. Fuel Corporation.

Q. 25. That was the business operated by Mr. Busbee?

A. Yes, sir.

Q. 26. During the time you were still with the Chattanooga Coal Company did you, as a member of that Company, or the Company itself, so far as you know, authorize Mr. Flanagan not to ship and deliver coal under this contract of April 12th?

A. No, sir.

[fol. 242] Q. 27. Do you know of any application being made by Mr. Latimer, Fuel Agent for the N. C. & St. L., or some similar position with the Railroad by which an agreement of that kind was made?

A. No, sir, I don't know anything about it, if it was; I was out of town a good part of the time.

Cross-examination.

By J. J. Lynch:

Q. 1. Mr. Thrasher, up to the time you left the Chattanooga Coal Company, about June 1st, had you ever communicated to Mr. Flanagan, or any one connected with the Tracy City Coal Company, the fact of this assignment to the Federal Coal Company?

A. No, sir, I had never told them that.

Q. 2. I will ask you if all that time the coal was not billed to

the Chattanooga Coal Company and the checks to pay for it were not sent by the Chattanooga Coal Company?

A. We paid the Tracy Coal Company for it is my recollection.

Q. 3. By "we" you mean the Chattanooga Coal Company?

A. Yes, and the Federal Coal Company paid us, we invoiced it to the Federal Coal Company, that is my recollection.

Q. 4. I will ask you if in all your negotiations with Mr. Flanagan or any one connected with the Tracy City Coal Company about the shipment of this coal, if anyone with that Company ever hinted or [fol. 243] suggested that the Tracy City Coal Company was insolvent or was not able to pay damages for the breach of the contract?

A. No, sir, I was always under the impression they were all right; Mr. Beesley at Murfreesboro was interested, and I understood he was pretty well off financially.

Q. 5. I will ask you if Mr. Thompson, Mr. E. R. Thompson of the Federal Coal Company, didn't call on you to bring suit against the Tracy City Coal Company for breach of this contract, and if so, about when did it occur?

A. Mr. Thompson was pretty hot to have this coal shipped, and I asked Mr. Thompson if he had any suggestion to make how we could make some shipments, and he said "consult a lawyer," and we did.

Q. 6. Who did you consult?

A. Mr. Stanfield.

Q. 7. Mr. Tom Stanfield?

A. Yes, sir.

Q. 8. What did he advise you?

A. Advised us to bring suit against the Federal Coal Company.

Q. 9. Was Mr. Bates with you?

A. Yes.

Q. 10. I will ask you if you reported that to Mr. Thompson?

A. Yes, we come back and told him.

Q. 11. When you went back and reported to him that your lawyer advised you to sue the Federal Coal Company instead of the [fol. 244] Tracy City Coal Company, what did Mr. Thompson say?

A. He didn't like it much.

Q. 12. State what he said, exactly as you remember it?

A. I believe he told me that me and the Chattanooga Coal Company could go to "Hell," but then he changed his mind and said we didn't have to.

Q. 13. So none of you went?

A. No, we haven't gone yet.

Q. 14. I will ask you whether or not after that, suit was brought by the Chattanooga Coal Company by Mr. Bates, the surviving member of the firm?

A. I understand it was.

Q. 15. I will ask you if you or your lawyer were ever anxious to bring suit against the Tracy City Coal Company for breach of that contract?

A. We were willing to do what we could, and we were under the impression the thing to do was to bring suit against the Tracy City

Coal Company until we consulted our lawyer, and he said we should bring suit against the Federal Coal Company. He first said bring suit against both, then he changed his mind and said bring it against the Federal Coal Company.

Q. 16. And that is what you reported to the Officials of the Federal Coal Company?

A. Yes, sir. I left the Chattanooga Coal Company shortly afterwards.

And further this deponent saith not.
[fol. 245]

— — —, By Bessie M. Gorman.

Sworn to before me this the 5th day of March, 1922. —
—, Notary Public.

Next witness, JOHN CHROSNIAK, after being duly sworn, deposed as follows:

Direct examination.

By C. C. Moore:

Q. 1. Mr. Chrosniak, you have given your deposition once or twice in this case heretofore, have you not?

A. I have.

Q. 2. Were you employed by the Federal Coal Company in April, May, June and up to and through the year 1920?

A. I was.

Q. 3. The contracts exhibited to the pleadings in this case disclose that about April 7th, 1920, the Federal Coal Company purchased from or took an assignment from the Chattanooga Coal Company of 18,000 tons of coal, which that Company had purchased from the Tracy City Coal Company or in that name. Did you have any part in the negotiations of that contract with the Chattanooga Coal Company?

A. No, sir.

Q. 4. After that contract was made, state what, if anything you had to do with keeping track of the coal that was delivered under [fol. 246] that contract coming from the Tracy City Coal Company?

A. I would on receipt of invoices from the Chattanooga Coal Company, I would run these cars through our books and draw a voucher for the payment of same.

Q. 5. How was that coal billed, to the Federal Coal Company?

A. To the Federal Coal Company by the Chattanooga Coal Company.

Q. 6. Did you see, at all, the billing from the seller, which was, as shown by the contract, the Tracy City Coal Company?

A. I would see the bills-of-lading, which were attached to the invoices of the Chattanooga Coal Company.

Q. 7. How was the coal invoiced to the Chattanooga Coal Company?

A. I could not say, the bills-of-lading, as near as I can recollect, showed the Tracy City Coal Company as shipper on the face of the bills-of-lading.

Q. 8. During that time, state whether or not the Federal Coal Company had purchasers for all the coal covered by that contract, and needed the coal?

A. Yes, sir.

Q. 9. Did you get the coal?

A. No, sir.

Q. 10. When you didn't get it, what did you do?

A. We would have to go out and buy other coal to re-place this contract coal.

[fol. 247] Q. 11. What did you do toward getting or trying to get that coal?

A. I made numerous demands upon the Tracy City Coal Company to ship the coal on that contract.

Q. 12. Was the Tracy City Coal Company and Mr. Flanagan advised of the fact that the coal was coming to the Federal Coal Company?

A. Yes, sir, I advised Mr. Flanagan to that effect on my first visit to Tracy City, which was on May 25th, of 1920.

Q. 13. Was that matter of any surprise to him at the time, or did he claim to have know it before?

A. He claimed he was not informed by the Chattanooga Coal Company that the assignment was made but it was a rumor, he heard a rumor to that affect.

Q. 14. At the time you advised him of that, did he claim that made any difference to him one way or the other?

A. No, sir.

Q. 15. What reason, if any, did he give for not shipping the coal?

A. Car shortage and contract with the N. C. & St. L. Railroad.

Q. 16. Did you see him later about it?

A. I did.

Q. 17. More than once?

A. I saw him on ten or twelve times.

Q. 18. And on these subsequent times when you would see him, what was his position on the subject of shipping the coal?

[fol. 248] A. Once or twice he mentioned the fact that the Tracy City Coal Company did not have a contract with the Federal Coal Company, that they had one with the Chattanooga Coal Company and it was for us to demand shipment from the Chattanooga Coal Company they were not going to recognize us in this contract, and on one or two other occasions Mr. Flanagan told me, "why ship you coal for \$3.90 when I can get \$7.00 and \$8.00 for it."

Q. 19. That increase in the price was the reason, is that what he said?

A. Yes, sir, I took it to be.

Q. 20. Was this car shortage excuse abandoned later or continued to be claimed?

A. It was continued to be claimed.

Q. 21. In fact, was coal being shipped to other people?

A. Yes, sir, I tried to check up on Mr. Flanagan or the Tracy City Coal Company from the Agent at Tracy City, but he would not let me examine his records.

Q. 22. Have you looked over Exhibit "L" to his deposition, which shows shipments during that period?

A. Yes.

Q. 23. Does it show he was shipping continually and substantially?

A. Yes, sir. There was on one occasion when I was discussing this contract with Mr. Flanagan, I told Mr. Flanagan we were going to sue him if he didn't resume shipments on the contract and he told me to go ahead and "bust" myself.

[fol. 249] Q. 24. During all this time, did Mr. Flanagan tell you that this contract of April 12th was his contract and the duty to fill it rested on him?

A. No, sir, I was always under the impression that this contract was with the Tracy City Coal Company's contract, and that Mr. Flanagan was not personally liable under the terms.

Q. 25. The record discloses a contract dated August 19th, 1920 for the sale of 200 cars from John D. Flanagan to the Federal Coal Company. Did you have any part in the negotiations leading up to the making of that contract?

A. I had the initial making of the contract, tentatively.

Q. 26. You mean the initial negotiations?

A. Yes.

Q. 27. How did the initial negotiations come up?

A. I was at Tracy City sometime in August and on this occasion Mr. Flanagan asked me if we would be interested in a contract. I told Mr. Flanagan we would probably be interested in a contract if we could get the coal around \$7.75. He told me he could not make the contract at \$7.75 but he could probably make one at \$9.00, which information I brought back to Chattanooga, and in turn passed it on to Mr. Thompson.

Q. 28. The Mr. Thompson you referred to, was the executive officer of the Federal Coal Company at the time?

A. Yes, sir.

Q. 29. Following that report, what next occurred, as you remember?

[fol. 250] A. Mr. Flanagan came to Chattanooga to confer with Mr. Thompson in regards to the contract entered into on August the 19th.

Q. 30. Were you present during that conference?

A. I think I was.

Q. 31. Did that conference result in the agreement to make the contract at that time?

A. They agreed to a tentative agreement, Mr. Thompson wanted a few days to think it over before he gave his final word.

Q. 32. That contract of August 19th, stipulated for a release of the Tracy City Coal Company contract of April 12th. Was that matter discussed in your presence?

A. Yes, sir.

Q. 33. What reason, if any, did Mr. Flanagan give for wanting that stipulation put in that contract?

A. He said if they did sue the Tracy City Coal Company, we could not get anything even if we got a judgment against them.

Q. 34. Did he say anything about the fact that he was a stockholder in the Tracy City Coal Company or anything of that kind, or had an interest in it in any way?

A. No, sir, I didn't hear it.

Q. 35. During all of that negotiation, leading up to the making of that contract, did Mr. Flanagan at any time tell you or Mr. Thompson, in your presence, or any Officer of the Federal Coal Company that this contract of April 12th. that is recited to be cancelled in this contract of August 19th. was, in fact, Flanagan's contract?

[fol. 251] A. No, sir.

Q. 36. Did he say, or intimate at all, that he was in any way obligated for the shipment of the coal stipulated in that April 12th. contract?

A. No, sir.

Q. 37. Now, previous to this time, the making of the August contract, had you been to Tracy City in company with Joe W. Thompson and Mr. Bates in respect to the shipments of coal under that April 12th. contract?

A. Yes, sir.

Q. 38. Do you recall about what time it was that you, yourself, Mr. Bates and Mr. Joe Thompson, Attorney went to Tracy City on that business?

A. About July 7th. or 8th., 1920.

Q. 39. What was the business of you gentlemen in making that trip, and what did you try to do after you got there?

A. I was up there when Mr. Thompson and Mr. Bates arrived, I was up there trying to buy coal. Mr. Thompson and Mr. Bates came up there to compel Mr. Flanagan to ship coal on that contract.

Q. 40. How long were Bates and Joe Thompson in Tracy City?

A. They arrived there one evening and left the next day.

Q. 41. Did you take part with them in the negotiations with Mr. Flanagan on the subject of the shipment of that coal?

A. Yes, sir.

Q. 42. What, if any reason was given on that occasion for not [fol. 252] shipping the coal?

A. Car shortage and the N. C. & St. L. contract.

Q. 43. Was anything said on that occasion about enforcing a contract against the Tracy City Coal Company?

A. Yes, sir.

Q. 44. What was said?

A. Mr. Thompson demanded that something be done to resume shipments on that contract and Mr. Flanagan didn't seem to be worried very much over that contract for the simple reason he could not get cars, and the N. C. & St. L. Railroad was taking all the coal he was getting out of the Tracy City mines.

Q. 45. Was anything said at that time about the ability of the Tracy City Coal Company to respond under that contract?

A. No, sir.

Q. 46. Was anything said about what would happen to the Tracy City Coal Company if you sued it and enforced damages under that contract?

A. Mr. Flanagan told me on the street in front of his office after the conference in his office over the terms of that contract between Mr. J. W. Thompson, W. S. Bates and myself, that if we were to sue the Tracy City Coal Company and get damages against them we would force them into Bankruptcy. This statement was also made by Mr. J. C. Beesley to me in front of the Bank at Tracy City the same day.

Q. 47. Was Mr. J. C. Beesley in Tracy City on that occasion?

[fol. 253] A. Yes, sir.

Q. 48. What was his position with the Tracy City Coal Company at that time?

A. He was the President, I believe.

Q. 49. And what was Mr. Flanagan's position?

A. He was the Vice-President and General Manager.

Q. 50. Was any proposition looking to the settlement of the claim against the Tracy City Coal Company under that contract discussed on that occasion?

A. Yes, sir.

Q. 51. What, in substance, was the proposition that was discussed?

A. There was a tentative agreement made whereby the Federal Coal Company was going to act as the Selling Agent for the Tracy City Coal Company, the Campbell Branch Coal Company *Company* and John D. Flanagan. The Federal Coal Company was to handle all of the coal mined or handled by the above concerns at a profit of 60-cents per ton. However, this agreement fell through a week or two later.

Q. 52. Was the matter actually agreed upon or was it merely discussed as a tentative basis of agreement?

A. Tentative basis of agreement and subject to the approval of Mr. E. R. Thompson who is Secretary & Treasurer of the Federal Coal Company.

Q. 53. During the discussion of that tentative agreement was the matter telephoned to Mr. Thompson, the executive officer of the Federal Coal Company?

[fol. 254] A. Yes, sir.

Q. 54. Who telephoned it to Mr. Thompson?

A. Mr. J. W. Thompson and myself, we each talked.

Q. 55. Did Mr. E. R. Thompson approve and authorize the making of the agreement at the time?

A. No, sir, he said he would have to see it in black and white before he would agree to do anything.

Q. 56. And was Mr. Flanagan advised that the matter could not be consummated on that occasion?

A. Yes, sir.

Q. 57. Was any writing drawn up as a preliminary draft of the agreeemnt to be made?

A. I think there was, it was drawn up by Mr. J. W. Thompson and Judge Garner, I believe he had something to do with it.

Q. 58. Who was Judge Garner representing?

A. The Tracy City Coal Company or John D. Flanagan, and I believe Mr. Beesley read that agreement over.

Q. 59. Did you read the paper over also Mr. Chrosniak?

A. Yes, sir.

Q. 60. Look to the paper now handed you and say whether or not you recognize the typewritten portion of this, as the preliminary draft then drawn up under the circumstances you have stated?

A. Yes, sir.

Q. 61. Please file this paper as Exhibit No. 1 to this deposition?

A. I will.

Exhibit No. 1.

[fol. 255] Q. 62. This paper which you have filed as Exhibit No. 1 has endorsed on it in pen some modifications or additions. Were they written at Tracy City or subsequently?

A. They were written in there subsequently.

Q. 63. Can you explain why that was written in?

A. Mr. Thompson would not agree to the clause in that contract of July 15th, wherein it prohibits the Federal Coal Company from buying any coal from any one at Tracy City outside of the Tracy City Coal Company, the Campbell Branch Coal Company and John D. Flanagan Coal Company.

Q. 64. Which Mr. Thompson do you refer to as not agreeing to this?

A. Mr. E. R. Thompson, Secretary & Treasurer of the Federal Coal Company.

Q. 65. Who wrote in this manuscript change?

A. Mr. J. W. Thompson.

Q. 66. When was that done?

A. That was done at Chattanooga in the office of the Federal Coal Company.

Q. 67. When with respect to your trip to Tracy City?

A. That was a few days later, I don't know exactly what date that was written in there, I know it was after I came back from Tracy City.

Q. 68. I show you a carbon copy of another draft similar to this Exhibit except that paragraph five has added to it a provision "excepting coal produced by the Tennessee Consolidated Coal Com-[fol. 256] pany" from the restrictions upon the purchase of coal in the Tracy City district, and attached to that draft is a carbon copy of letter dated July 8th, 1920, addressed to John D. Flanagan, Tracy City, Tennessee, initials, "J. W. T./L. P.," and ask you to say what, if anything you know about these papers?

A. Paragraph five of the modified copy of contract I have in my hand, as referred to is a clause that Mr. E. R. Thompson requested

to be put in this contract, and the reason that this contract did not go on through was because Mr. Flanagan objected to this paragraph, and therefore the contract fell through.

Q. 69. Will you file this modified form referred to and the carbon copy of letter, both of which you now hold, fastened together, as Exhibit 2 to your deposition?

A. Yes, sir.

Exhibit No. 2.

Q. 70. State whether or not after this modified form of contract was prepared and forwarded Mr. Flanagan came over to Chattanooga?

A. Yes, sir.

Q. 71. Was another meeting and conference then had between him and Mr. E. R. Thompson, Secretary & Treasurer of the Federal Coal Company, in respect to this matter?

A. I understand so, I was out of the City during Mr. Flanagan's visit to the offices of the Federal Coal Company, but upon my return to the office Mr. Thompson told me.

[fol. 257] Q. 72. You don't know what took place then on that occasion?

A. No, sir.

Q. 73. Mr. Chrosniak, state whether or not from April 1920 to April 1921 your business as an employe of the Federal Coal Company caused you to be acquainted with the market price of coal in the Tracy City territory and in the Chattanooga district?

A. Yes, sir.

Q. 74. Could you state from memory what was the market price during that period without looking to records and verifying?

A. No, sir. I would have to consult the records before I made any statement on the market price of coal.

Q. 75. What records would you consult to satisfy yourself?

A. Our wholesale record book.

Q. 76. When you say "our wholesale record book," do you mean the Federal Coal Company's wholesale record book?

A. Yes.

Q. 77. Was the Federal Coal Company buying and selling coal in this territory at that time?

A. Yes, sir.

Q. 78. Were you buying and selling on the market?

A. Yes, sir.

Q. 79. And would your books then disclose the market price during that period?

A. Yes, sir.

Q. 80. Have you looked over the sales records that Mr. Flanagan [fol. 258] has filed as Exhibit "L" to his deposition?

A. Yes.

Q. 81. How do the prices shown on Mr. Flanagan's records compare with the prices reflected by the Federal Coal Company's records for the same corresponding period?

A. His was a little lower during the entire period than the Federal Coal Company's.

Q. 82. How do the records of sales shown on Mr. Flanagan's record, that is, the selling price, compare with prices the Federal Coal Company was paying in the Tracy City district at that time?

A. They are about correct.

Cross-examination.

By Judge J. J. Lynch:

Q. 1. Did the prices during January, February, March and April of 1921 continue about the same, or lower, or higher than that of December 1920?

A. I could not state for the simple reason I did not buy any coal from that section during those months.

Q. 2. Then you have no knowledge of the market price in that section except such as you can find from the records?

A. Yes, sir.

Q. 3. Why didn't you buy any in that period, during those months?

A. We had no demand for it.

[fol. 259] Q. 4. The market went all to pieces?

A. Yes.

Q. 5. And during that period it was at its lowest ebb?

A. Yes, sir.

Q. 6. You say that you had contracts or had all the coal sold you had contracted for from the Tracy City Coal Company. To whom did you have it sold?

A. We had 100 cars of coal sold to the Emmons Coal Mining Company at Philadelphia.

Q. 7. What date was that contract made?

A. About the 9th day of September I believe.

Q. 8. Then that was long after the Tracy City Coal Company contract had been abandoned, was it not?

A. No.

Q. 9. The Tracy City Coal Company contract was abandoned in May. I am asking you about the Tracy City Coal Company contract you testified about awhile ago when you said you had all the coal you purchased under the Tracy City Coal Company contract sold, I asked you to whom you had it sold?

A. Most of it was going to Charleston, S. C. for Export.

Q. 10. Where was the balance going?

A. It was all going there if he would have given us the coal.

Q. 11. Did you have any other contract for it except that?

A. We had some coal that went to Godley & Griffin, shipped some to Douglasville.

Q. 12. That is all you can think of at this time?

[fol. 260] A. Yes, sir.

Q. 13. Back to the matter of your conversation at Tracy City at

the time of the negotiations for the commission contract, copies of which you have filed here, you say Mr. Beesley was there?

A. Yes.

Q. 14. Mr. Beesley was the President of the Tracy City Coal Company?

A. Yes, sir.

Q. 15. Mr. C. H. Garner was there?

A. Yes.

Q. 16. He was advising Mr. Beesley as Counsel for the Tracy City Coal Company, was he not?

A. Yes, sir.

Q. 17. Mr. Joe Thompson was there advising you, was he not?

A. He was not advising me, he represented the Federal Coal Company in that particular case.

Q. 18. And was advising you as Agent for the Federal Coal Company?

A. Yes.

Q. 19. You heard the negotiations between Mr. Garner and Mr. Joe Thompson about the matter?

A. Not all of them.

Q. You were there quite awhile?

A. Yes, sir.

Q. 21. And you heard the negotiations there when they were all together when you and Mr. Bates participated?

A. Yes.

[fol. 261] Q. 22. I will ask you if in that conference one single word was said about the Tracy City Coal Company not being able to pay any judgment you could get against it?

A. I don't believe that question was brought up.

Q. 23. It was not discussed at all as a reason why it should be cancelled?

A. No, sir.

Q. 24. On the other hand didn't Mr. Garner state he had advised his client, the Tracy City Coal Company that that contract was not assignable and that the Federal Coal Company didn't acquire any rights under it?

A. I had no knowledge of that statement being made. That question was not brought up as near as I can remember.

Q. 25. You do remember that had been stated to you prior to this time, by Mr. Flanagan?

A. No, sir.

Q. 26. Didn't you swear it here awhile ago?

A. He said we didn't have any contract with the Tracy City Coal Company, that the Federal Coal Company had no contract with the Tracy City Coal Company, that the Tracy City Coal Company had a contract with the Chattanooga Coal Company.

Q. 27. Didn't you swear, a little while ago, sitting where you are now, that Mr. Flanagan told you that the Tracy City Coal Company [fol. 262] would not recognize the Federal Coal Company in that matter?

A. He told me this, that the Tracy City Coal Company did not have a contract with the Federal Coal Company, but they had a contract with the Chattanooga Coal Company.

Q. 28. Didn't you say awhile back he said further he would not recognize the Federal Coal Company in that matter?

A. No, sir.

Q. 29. Didn't you say, awhile ago, that Mr. Flanagan said to you, you would have to look to the Chattanooga Coal Company?

A. Yes.

Q. 30. And he did say that to you?

A. Yes, sir.

Q. 31. And that you could not look to the Tracy City Coal Company?

A. He didn't say that. Said if we wanted any coal on that contract,—this was one instance, on one occasion,—he said if we wanted any coal on that contract to take it up through the Chattanooga Coal Company.

Q. 32. Didn't you awhile ago, swear he said that to you on several occasions?

A. No, that was one occasion.

Q. 33. I am asking you what you swore; didn't you swear here awhile ago he said that to you on several occasions?

A. On one occasion.

Q. 34. I am asking you what you swore?

A. I said on one occasion.

Q. 35. And that statement is just as true as anything you have said today?

[fol. 263] A. One occasion, is the only time that fact was mentioned.

Q. 36. And one occasion is all you have testified to insofar as this contract between the Federal Coal Company and the Chattanooga Coal Company and the Tracy City Coal Company, you have told it all. Have you left untold anything that has occurred about this matter?

A. I don't know, there was so many things that happened up there about that time, I don't know what did happen.

Q. 37. When Mr. Beesley, as you say, told you, or Mr. Flanagan, as you say, told you, that you could not make any judgment you got out of the Tracy City Coal Company, what investigation did you make of the assets of the Tracy City Coal Company?

A. I didn't make any.

Q. 38. Who was present when these conversations, that you say, occurred?

A. Mr. Flanagan and myself when he told me we could not recover if we sued the Tracy City Coal Company; Mr. Flanagan and myself were alone on the side-walk in front of his office.

Q. 39. He told you you could not recover, if you sued them?

A. Yes.

Q. 40. And Beesley also told you you could not recover if you sued them?

A. Yes.

Q. 41. And that is what he said?

A. Yes.

[fol. 264] Q. 42. And you stick to that, that both Mr. Beesley and Mr. Flanagan said if you sued the Tracy City Coal Company you could not recover?

A. Yes, for the simple reason that the Tracy City Coal Company would be forced into bankruptcy.

Q. 43. Awhile ago I asked you if that was all, and you have added this.

A. That is the substance of the conversation.

Q. 44. Can you remember any two times alike?

A. Yes.

Q. 45. Don't you know that no such thing ever occurred?

A. It did.

Q. 46. Don't you know it is a pure afterthought conceived in your mind in the last few days, and you have never mentioned it before. I will ask you if you have never offered this to Bates as an excuse for not paying his commission?

A. No.

Q. 47. And you know it is a fabrication in your brains of the last few days?

A. No, sir.

Q. 48. Don't you know that you and your associates never mentioned to Bates, as an excuse for not paying his commission, that the Tracy City Coal Company was insolvent?

A. No.

Q. 49. Don't you know you never offered that as an excuse that you cancel the contract, because the Tracy City Coal Company was insolvent; don't you know it is a fabrication in your own brains within the last few days?

[fol. 265] A. No.

Q. 50. Are you the same Chrosniak that while working for the Federal Coal Company, has been going to the stockholders of the Federal Coal Company and telling them that your employer, Mr. E. R. Thompson was manipulating the Brokerage part of this business so as to take down many thousands of dollars, and not give it to the stockholders?

A. No.

Q. 51. You heard the question asked Mr. Thompson the other day?

A. Yes.

Q. 52. Are you the man that has been peddling that information against your employer?

A. No, sir.

Q. 53. That Mr. Thompson had entered into a side scheme of his own to take a large part of the profits that was going to the stockholders and putting it in his own pocket?

A. No, sir.

Q. 54. And are you the one that has been peddling that information against Mr. Thompson?

A. No, sir, they have tried to get that information lots of times but I failed to give it.

Q. 55. Haven't you told it was true?

A. No.

Q. 56. Weren't you sore at the time when you started peddling that information and didn't he have to fix it so you wouldn't be sore at him?

[fol. 266] A. No.

Q. 57. Do you know Isaac Roberts of Tracy City?

A. Yes.

Q. 58. He is connected with the Dixie Coal & Iron Company?

A. Yes.

Q. 59. You had a contract, or the Federal Coal Company had a contract at \$3.90 with the Dixie Coal & Iron Company?

A. Yes, I think it was about that.

Q. 60. And you were intrusted by your Company to try to get this coal on that?

A. Yes.

Q. 61. And didn't you make trips up there to get them to ship coal?

A. Yes.

Q. 62. And didn't you enter into a scheme with Mr. Roberts, instead of taking the coal and applying on this contract of \$3.90, to buy it for over \$7.00 and divide on the side, the surplus?

A. That is a damn lie,—that is a damn lie.

Q. 63. Who do you say told a damn lie?

A. That statement that Mr. Flanagan just made to you that I sold coal or bought coal from the Dixie Coal & Iron Company for \$7.00 and split the difference or surplus, or whatever you said.

Q. 64. How much did you get on the side for turning down your Company?

A. I didn't get a damn thing.

Q. 65. How much have you knocked down on the side in your transactions up there with Mr. Roberts and others when you were up [fol. 267] there pretending to represent the Federal Coal Company?

A. Not one penny.

Q. 66. And what other ways can you think you have betrayed Mr. Thompson and your associates?

A. I have not betrayed them.

Re-examination.

By C. C. Moore:

Q. 1. Unless there is something you want to say further, I don't know of anything I want to ask. Any part of it you want to explain, in view of the insinuations and charges made, you can do so?

A. I have not got anything to say.

Q. 2. Mr. Chrosniak, I will ask you whether or not shortly after April 12th, 1920, the coal market advanced rapidly in price?

A. It did.

Q. 3. State whether or not the demand for coal likewise increased and became quite urgent?

A. Yes, sir.

Q. 4. State whether or not the Federal Coal Company had numerous requests to sell coal to purchasers at these advanced prices, much beyond your ability to supply?

A. Yes, sir.

Q. 5. State whether or not if the coal stipulated in this contract at 8 cars per week had been furnished, it would have been sufficient to supply this active demand that you had at that time?

A. It would probably have helped to fill the demand at that time but it would not have filled all of our demand, 100%.

And further this deponent saith not.

— — —, By Bessie M. Gorman, Stenog.

Sworn to before me this — day of April 1922. — — —.

[fol. 268] E. R. THOMPSON, next witness, after being duly sworn, deposed as follows:

Direct examination.

By C. C. Moore:

Q. 1. Mr. Thompson, your deposition, I believe, has been given as much as twice, at least in this case, heretofore?

A. I think it has.

Q. 2. You are still connected with the Federal Coal Company?

A. I am.

Q. 3. Attached to the pleadings in one of these cases, or perhaps both, is a contract between the Chattanooga Coal Company and the Federal Coal Company, assigning to the Federal Coal Company the coal contracted for by the Chattanooga Coal Company, from the Tracy City Coal Company. I will ask you whether or not you negotiated and entered into that contract on behalf of the Federal Coal Company?

A. Yes, sir.

Q. 4. Explain how it happens that these contracts were made in this indirect manner rather than directly?

A. I learned that the U. S. Fuel Corporation had this coal for sale, and as I was not on friendly terms with them, I told Mr. Bates that I would like to have him see if he could negotiate a purchase of the U. S. Fuel Corporation's coal, that we could protect him to the [fol. 269] extent of a commission of 10 cents per ton, if he would negotiate the contract.

Q. 5. Please look to this and say what this is?

A. That is a circular letter signed by the U. S. Fuel Corporation, dated April 3rd, 1920, setting forth various parcels of coal which that concern had to offer to the trade.

Q. 6. State whether or not that circular letter gave you the information that the U. S. Fuel Corporation had this coal for sale?

A. Yes, sir.

Q. 7. Will you please file that circular letter as Exhibit No. 1 to this deposition?

A. I will.

Exhibit No. 1.

Q. 8. State whether or not that circular letter was sent out to the trade in Chattanooga?

A. It came to me from, I think, our representative in Atlanta, telling me that was being received by various places of purchasers of coal in that territory, and I presume it was sent out broadcast.

Q. 9. You personally don't know how that is?

A. I don't know, no, sir.

Q. 10. After getting this circular letter you saw Mr. Bates, as stated above?

A. Yes.

Q. 11. What commission per ton did you say you promised Mr. Bates at the time?

A. Ten cents.

Q. 12. That was based on the price as stated in this letter?

A. \$4.00, yes, sir.

[fol. 270] Q. 13. How does it happen you stipulated for a 20-cent commission in this Bates contract?

A. I was expecting to have to pay \$4.00 for the coal, I mean it would take \$4.00 to get the coal from the mines, and was going to allow Bates 10 cents, making the cost to us, \$4.10. Mr. Bates went to the U. S. Fuel Corporation and negotiated the purchase on the basis of \$3.90, and claimed the benefit of the extra dime and refused to make the trade with me unless he got it.

Q. 14. Now, approximately, how much coal was delivered under that contract?

A. 785 tons is my recollection.

Q. 15. How was the billing of that coal handled?

A. The Chattanooga Coal Company would come to us with an invoice for a car at \$4.10 a ton and a bill-of-lading for that coal, showing that the car had been shipped, we would then give the Chattanooga Coal Company check for it.

Q. 16. The Chattanooga Coal Company in turn made settlement with the Tracy City Coal Company or Flanagan or somebody else?

A. I presume so.

Q. 17. For how long were shipments and deliveries continued under that contract?

A. Until the latter part of May 1920.

Q. 18. During that time, that is, April and May, were deliveries made in full as provided by the contract?

A. No, sir, at no time did they ship the weekly quantities provided in the contract.

[fol. 271] Q. 19. During that period, state whether or not the Federal Coal Company needed and sought to get the full amount stipulated in the contract?

A. The market was very strong and we were able to get orders for large quantities at larger prices than the contract price for this coal, and for that reason, the fact that we were losing the profits, I made almost daily demands on Mr. Bates and Mr. Thrasher of the Chattanooga Coal Company.

Q. 20. What did you seek to have these gentlemen do?

A. I told them that as the contract was made between them and the Tracy City Coal Company, it was up to them to go after the Tracy City Coal Company and insist that they make shipments.

Q. 21. Later, state whether or not the Federal Coal Company made any direct demand on the Tracy City Coal Company to get shipments made?

A. Yes, sir; the shipments dwindled to nothing, we were sending Mr. Chrosniak up there pretty often anyhow, I told him to see what he could do. Also the first part of July I caused Mr. Chrosniak, Mr. Bates and Mr. Joe Thompson to go to Tracy City to see what they could do about getting shipments made on the contract, and I made arrangements for Mr. Beesley, the President of the Tracy City Coal Company to be there on that date.

Q. 22. Did you get any more coal?

A. No, sir.

Q. 23. State whether or not you were telephoned to from Tracy [fol. 272] City on the date that J. W. Thompson, Bates and Chrosniak were there with respect to a proposition for making a new contract and novating the existing contract?

A. I was.

Q. 24. What, in substance, was the purpose of that telephone conversation?

A. They reported to me they were afraid we could not get any where in attempting to make them ship on the old contract, but that Mr. Flanagan proposed in lieu of that to let us sell all this coal, I think a minimum quantity was mentioned, on a commission. I told them that it was a little to important a matter to snap off on the telephone and say I would agree or would not agree to it. If they thought they could not get any where under the old contract, to come on back and bring a draft of what Mr. Flanagan was willing to agree to, and we could discuss it here, and then arrive at a decision.

Q. 25. Was a draft brought back?

A. Yes, sir.

Q. 26. Look to the paper that has been filed as Exhibit 1 to Mr. Chrosniak's deposition and say whether or not that is the draft that was brought back?

A. That is, yes, sir.

Q. 27. After going over the matter, was that draft satisfactory or not?

A. It was not.

Q. 28. Thereupon, state whether or not a re-draft was made of that contract which would have been satisfactory to you?

[fol. 273] A. Yes, at my suggestion Mr. J. W. Thompson had a new contract written, changing the proposition so as to allow us to

do business with the Tennessee Consolidated Coal Company. This contract would have been satisfactory if we could have arrived at a reasonable settlement with Mr. Bates, and I told Mr. J. W. Thompson that and he wrote Mr. Flanagan accordingly.

Q. 29. Is this Exhibit 2 to Chrosniak's deposition the re-draft that was satisfactory?

A. Yes, sir.

Q. 30. What, if anything, further was done about that matter?

A. Mr. Flanagan came to Chattanooga probably two or three days later and we held a conference in regard to it in this office.

Q. 31. What was his position then with respect to the provision you insisted on?

A. He was unwilling to agree to it; said he would have to insist that we buy no coal from the Tracy City section except through him, that he could not agree to our having the privilege of dealing with the Tennessee Consolidated Coal Company.

Q. 32. Then did the matter fail?

A. The matter failed.

Q. 33. Now, a contract dated August 19th, 1920 is in evidence. State what negotiations you took part in leading up to and in the making of that contract?

A. These negotiations were had about the middle of August. We had not got any where under the old contract and Mr. Chrosniak was going up there pretty often, and I presume had seen Mr. Flanagan about every time he was there. He reported to me that from his conversations with Mr. Flanagan he found we could make another contract at a higher price and be assured of getting the coal, letting this new contract cancel the old one, and as the market was mighty strong at the time and looked like it would get stronger every week, we thought that a new contract whereby we would have more chance at least of getting the coal, might enable us to make a good profit on the coal while the market was good, so we rather looked with favor on it for that reason. The result was, Mr. Flanagan, probably after a telephone conversation with Mr. Chrosniak, came to Chattanooga and here in Chattanooga we drafted the contract of August 19th.

Q. 34. In the negotiations for that contract, and in the making of it and in previous negotiations up to that time, were you informed by Mr. Flanagan, or any one else, that the contract of April 12th, 1920 was Mr. Flanagan's contract, and that he was obligated to ship the coal under it?

A. No, sir, I was not.

Q. 35. Up to that time whose contract did you understand that to be?

A. I understood it was a contract of a Corporation, Tracy City Coal Company.

Q. 36. State whether or not the nature of Mr. Flanagan's interest in the Corporation was explained to you at all?

A. I knew in a general way he was Vice-President of the corporation, and presumed that he was a large stockholder, although I also knew that Mr. Beesley of Murfreesboro was the President of the Corporation.

Q. 37. Did you know or have any information at the time about the nature of the contracts between Mr. Flanagan and the Tracy City Coal Company?

A. I didn't know anything about them at all.

Q. 38. If you had known at the time that contract was being negotiated, that the previous contract was Mr. Flanagan's contract, and that in the making of this contract of August 19th you were getting no more than another promise from Mr. Flanagan to deliver the same coal, would you have entered into it?

Mr. Lynch: The foregoing question is objected to because it is pure speculation, because the hypothesis stated is not true, and because not a proper question to put to the witness.

A. I think I probably would not have made it.

Q. 39. State whether or not you were familiar during that time, with the market price and value of coal in the Tracy City district and Chattanooga?

A. Yes, sir.

Q. 40. Do you carry those prices in memory or would you have to refer to records?

A. I would refer to our books as to what we actually did during that period.

Q. 41. During that period was the Federal Coal Company buying coal in the Tracy City district?

A. Yes, sir.

[fol. 276] Q. 42. State whether or not you have looked over Exhibit which Mr. Flanagan has filed to his deposition covering his shipments from June 1st to the end of 1920. Have you looked over it?

A. Yes.

Q. 43. Have you noted in looking over it, the prices that Mr. Flanagan charged on that Exhibit for coal sold, and how does it compare with the prices paid by the Federal Coal Company in that territory?

A. That would take a very careful examination because the market was changing quite frequently; it would be pretty hard to compare them without making a very careful comparison of the two records, which I have not done.

Q. 44. Will you look to that record and compare the same with the shipping record filed by Mr. Flanagan and make up a statement from week to week beginning with April 12th, 1920 and running through the year 1920, showing the market price in the Tracy City territory for coal of the kind and grade stipulated for in this contract of April 12th, 1920, and also show on that Exhibit how it compares with the price as reflected by Mr. Flanagan where the periods are the same, and mark it Ex. 3?

A. Yes, sir.

Exhibit No. 3.

Q. 45. Will you also, either on that or another Exhibit, make up a statement showing the amount of coal that was actually shipped

and delivered under that contract of April 12th, 1920, and the amount that was in default and not shipped, week by week and [fol. 277] figure out upon such statement the difference between the contract price and the market price upon the amount of tonnage thus shown to be in default for that period, through the year 1920?

A. I will.

Q. 46. Mr. Thompson, what was the average tonnage of a car of coal off of the N. & C. Railroad from the Tracy City district during that period?

A. I have not made any calculation but we generally figure them as 45 to 50 tons.

Q. 47. Did they vary?

A. Yes, sir, might get a car that didn't contain as much as 40 tons, and another time it might possibly have 60 in it.

Q. 48. Will you figure out from the number of cars that were actually shipped, making up the 785 tons delivered under that contract of April 12th, what was the average weight of coal actually shipped under that contract?

A. I will.

Q. 49. And file it as Exhibit No. 4.

A. I will.

Exhibit No. 4.

Q. 50. This contract of August 19th, 1920, has pinned to it a guarantee; explain how that happen to be put on there?

A. Well, we had one contract with that outfit that had not been carried out. We were making another to cancel the other and I told them I wanted something besides the signature, and knowing that Mr. Beesley was very responsible, I said I would make it in case he would personally guarantee it, and he did guarantee it.

Q. 51. State whether or not previous to the actual execution of [fol. 278] that contract, information had come to you that the Tracy City Coal Company was without responsibility?

A. I was informed that they didn't own the land in fee simple title, they had a lease on it, and that lease was a mortgage in some way to secure a loan, and it was my understanding in a general way, even if we got a judgment we might not be able to collect it.

Cross-examination.

By Judge J. J. Lynch:

Q. 1. Did you ask Mr. Flanagan anything about his interest under the first contract, or what those contracts between him and the Tracy City Coal Company meant?

A. No, sir, I had no information about him and the Tracy City Coal Company contract, they had not been mentioned to me.

Q. 2. I will ask you to examine the fourth paragraph in the tentative agreement that Chrosniak has filed here as Exhibit 1 and ask you if you asked Mr. Flanagan what those contracts there referred to meant or anything with reference to those contracts?

A. No, sir, I did not.

Q. 3. I will ask you if at the time you entered into the last contract, I mean the contract made in August with Mr. Flanagan, if you had not been attempting to negotiate a contract for coal at \$9.00 a ton with the Dixie Coal & Iron Company and with the Staub Coal Company at that price?

A. I made no such negotiations, I had no negotiations with them at all at \$9.00 or any other —.

[fol. 279] Q. 4. Didn't you send Mr. Chrosniak up there to make these negotiations?

A. No, sir.

Q. 5. And you never heard of such negotiations?

A. No, sir.

Q. 6. Did you ever offer as an excuse to Mr. Bates or to Mr. Thrasher why you declined to pay them or the Chattanooga Coal Company the commissions provided for in the first contract, the alleged fact of the doubtful solvency of the Tracy City Coal Company?

A. I was not giving any excuses to Mr. Bates or Mr. Thrasher at all, I was demanding that they do something.

Q. 7. When they demanded of you to pay this commission did you offer that as a reason?

A. No, sir, Mr. Thrasher has already testified about that.

Q. 8. Besides telling him to go to Hell what other excuse did you offer?

A. I told them if they thought they had a suit against the Federal Coal Company to go ahead and sue; they did a good deal later.

Q. 9. And succeeded in it?

A. Not necessarily.

Q. 10. So far they have?

A. They got a judgment in the lower Court.

Q. 11. You don't consider that of very much importance?

A. (Witness does not answer.)

Q. 12. In that suit did you offer as a defense or excuse why you cancelled this contract, that the Tracy City Coal Company was of [fol. 280] doubtful solvency?

Mr. Moore: The foregoing question and any answer thereto is excepted to because the pleadings is the best evidence and will show what defenses were made in that case.

A. I don't remember all that has happened in the case, but I suggest the record will disclose that fact if we did.

Q. 13. You got that suggestion from your Counsel's objection?

A. I was going to make that any way, it flitted in my mind just as you made the question.

And further this deponent saith not.

By Bessie M. Gorman, Stenog.

Sworn to before me this the — day of April, 1922. —
—, Notary Public.

[fol. 281]

March 7th, 1922.

Next witness, W. S. BATES, Introduced on behalf of the Federal Coal Company, after being duly sworn, deposed as follows:

Direct examination.

By C. C. Moore:

Q. 1. Mr. Bates, I will ask you whether or not in April of 1920 you were engaged in the coal selling and Brokerage business in Chattanooga?

A. Yes, sir.

Q. 2. What was the style under which you conducted your business?

A. Chattanooga Coal Company.

Q. 3. I will ask you whether or not you paid a privilege tax as a coal dealer to Hamilton County for the year 1920, and had a license as such?

A. I did.

Q. 4. Have you that license now in your possession?

A. No, sir.

Q. 5. Have you lost or mislaid it in some way?

A. I think it is in the file of my office.

Mr. Lynch: Counsel for complainant admits Mr. Bates had a license and paid the tax.

Q. 6. The record of these two cases in which this proof is taken to be read as evidence, contains more than one copy of a contract entered into between the Tracy City Coal Company as seller and the Chattanooga Coal Company as purchaser, stipulating for the shipment and delivery of 8 carloads of coal per week beginning April [fol. 282] 12th, 1920 and extending until April 12th, 1921. I will ask you whether or not you, representing the Chattanooga Coal Company negotiated that contract?

A. Yes, sir.

Q. 7. With whom representing the Tracy City Coal Company did you negotiate it?

A. T. O. Busbee, acting Agent.

Q. 8. After that contract was negotiated, state whether or not you obtained a confirmation of the authority of Mr. Busbee to make the contract?

A. Yes, sir.

Q. 9. Was that in writing?

A. Yes, sir.

Mr. Lynch: Counsel here states that that confirmation has been filed in the Bates case and agrees that same may be looked to as if filed in this case.

Q. 10. That contract which you negotiated has a guarantee of the Chattanooga Coal Company to take and pay for the coal, signed

by C. M. Preston. Please state why C. M. Preston was the guarantor on that contract?

A. In order to satisfy the Tracy City Coal Company the payment would be made as agreed.

Q. 11. State whether or not that contract was negotiated by you predicated upon a contract that you had made or agreed to make with the Federal Coal Company by which the Federal Coal Company was to take this coal?

A. It was.

Q. 12. Mr. C. M. Preston was interested in the Federal Coal Company, was he, or not?

A. I understood that he was, but I do not know.

Q. 13. Mr. T. R. Preston was the President of the Federal Coal Company?

A. I understand so.

Q. 14. He is a brother of C. M. Preston?

A. Yes, sir.

Q. 15. Now, the record shows that approximately 785 tons of coal were shipped and delivered under that contract. Please state, Mr. Bates, how that coal was billed and paid for from the Tracy City Coal Company; that is, whether to you or the Federal Coal Company?

A. It was billed to the Chattanooga Coal Company and in turn invoiced by the Chattanooga Coal Company to the Federal Coal Company.

Q. 16. Then the Federal Coal Company paid you and you paid the Tracy City Coal Company?

A. Yes, sir.

Q. 17. Now was all of the coal that was shipped under that contract paid for promptly?

A. Yes, sir.

Q. 18. Was all the coal shipped under the contract that was stipulated to be shipped?

A. No, sir.

Q. 19. Was as much as 8 cars shipped in any single week under the contract?

A. I don't remember that there was ever that much shipped one week.

[fol. 284] Mr. Lynch: Here counsel for complainant states that exhibits filed in the Bates case show the correct amount, and dates of shipment, and it is great it may be looked to as evidence to save time.

Q. 20. When the shipments under this contract fell below 8 cars per week, as stipulated, state whether or not you undertook to secure shipments of the additional coal up to the amount of the contract?

A. I endeavored to get the coal shipped.

Q. 21. Just state what you did to get that coal shipped, Mr. Bates?

A. I wrote letters to Tracy City Coal Company and called them up over the telephone.

Q. 22. Who did you talk to and deal with in your efforts to get the coal shipped, as representing the Tracy City Coal Company?

A. Mr. John D. Flanagan.

Q. 25. What reason, if any, did Mr. Flanagan give for not shipping the coal?

A. The main reason was on account of car shortage and I believe he made an excuse that some contract he had with the Railroad Company had something to do with it.

Q. 24. Did you call him often or not?

A. Yes, sir.

Q. 25. Did you write him several times or otherwise?

A. Yes, sir, I wrote him several times.

Q. 26. The shipments of coal referred to as Exhibits, ceased about the last of May 1920. State whether or not after they ceased to make [fol. 285] shipments you continued to endeavor to get shipments made?

A. I made an effort to get the shipments made up until the time Mr. Joe Thompson accompanied me on a trip to Tracy City to interview Mr. Flanagan in regard to this matter.

Q. 27. Had you been able, with all your efforts, to get any shipments made up to that time?

A. No, sir.

Q. 28. Do you remember what time that was?

A. Seems to me like it was in July, I don't remember right now.

Q. 29. Other witnesses have fixed the date as the 7th or 8th of July, state whether or not that approximately records with your recollection?

A. Yes, sir.

Q. 30. Who was in Tracy City with you on that occasion, on the mission of getting this coal shipped?

A. Mr. Joe Thompson, representing the Federal Coal Company accompanied me on that trip.

Q. 31. And was Mr. Chrosniak in Tracy City when you got there?

A. Yes, sir.

Q. 32. Who was there in Tracy City that you saw and negotiated with, representing the seller of that coal?

A. Mr. Flanagan and Mr. Beesley.

Q. 33. Would they agree on that occasion to make any further shipments under the contract?

[fol. 286] A. That is something I could not answer, on account of the fact that Mr. Chrosniak and Mr. Thompson and Mr. Flanagan I think talked that matter over between themselves, and I was not present at all the conferences.

Q. 34. Was or not some settlement or counter-arrangement discussed on that occasion?

A. Yes, sir, there was.

Q. 35. Did that counter-arrangement go into effect and was it fully agreed upon?

A. No, sir, it didn't go into effect.

Q. 36. Before that time, and during the time that the coal was being shipped and paid for, state whether or not Mr. Flanagan and the Tracy City Coal Company understood that this coal was going to the Federal Coal Company?

A. I believe they did understand that.

Q. 37. State why you believe they understood it, Mr. Bates?

A. Mr. Flanagan and Mr. Busbee both told me they understood Federal Coal Company had purchased this coal.

Q. 38. About when was that with respect to the date of the contract?

A. I don't remember the exact time but it was soon after the contract was made.

Q. 39. Was coal shipped and delivered under the contract after that?

A. Yes, sir, there was some coal shipped under the contract after that.

Q. 40. Mr. Bates, were you advised in the making of the contract, or at any time, that this contract, while nominally in the name of [fol. 287] the Tracy City Coal Company was, in fact, the contract of Mr. Flanagan, or anything to that effect?

A. No, sir, I did not know of that.

Q. 41. Were you advised that Mr. Flanagan had any responsibility at all with respect to the shipping of the coal under that contract, I mean personal responsibility?

A. No, sir.

Q. 42. Did you see and talk to Mr. Flanagan repeatedly about the matter and about the contract after the making of it up until this time in July?

A. Approximately all the conversations I had with him about it were over the telephone.

Q. 43. Did you have many of those over the telephone?

A. Several, yes.

Q. 44. On this occasion in Tracy City, the 7th or 8th of July that you have referred to, were you then told or anything said in your presence to the effect that that was Mr. Flanagan's contract and that the duty of delivering the coal rested on him?

A. No, sir.

Q. 45. You have since that time brought suit in this Court to obtain a judgment against the Federal Coal Company on account of your interest in the contract, have you not?

A. Yes, sir.

Cross-examination.

By Judge J. J. Lynch:

Q. 1. Mr. Bates, when you made this contract with Mr. Flanagan, you didn't contract for any personal liability against Mr. Flanagan, did you?

[fol. 288] A. No, sir.

Q. 2. You were perfectly willing to contract on the responsibility of the Tracy City Coal Company?

A. Yes, sir.

Q. 3. There was no understanding or thought of Mr. Flanagan assuming any responsibility to you or any one you represented in making that contract, was there?

A. No, sir.

Q. 4. There was nothing in request or desire on the par of the Federal Coal Company or by any — representing the Federal Coal Company to have Mr. Flanagan become responsible for the contract that you were requested to negotiate, was there?

A. No, sir.

Q. 5. They were perfectly willing to accept the responsibility of the Tracy City Coal Company, were they not?

A. Yes, sir.

Q. 6. And there was no other thought or suggestion, was there?

A. No, sir.

Q. 7. This question of Mr. Flanagan being responsible for this contract is a pure afterthought, so far as you know?

A. Yes.

Q. 8. They asked you if you knew Mr. Flanagan was personally responsible, you didn't know it then and you don't know it now, do you?

[fol. 289] A. No, sir.

Q. 9. You were asked what Mr. Flanagan knew or the Tracy City Coal Company knew about the Federal Coal Company's relations to the contract. They simply stated they had understood you had sold the coal to the Federal Coal Company?

A. Yes, sir.

Q. 10. And you told them you had sold the coal to the Federal Coal Company?

A. Yes, sir.

Q. 11. You did not undertake to disclose to them the private arrangement made between you and the Federal Coal Company about the matter?

A. No.

Q. 12. You didn't undertake to state to them the terms of the contract between you and the Federal Coal Company about that matter, did you?

A. No.

Q. 13. You never asked them to accept the Federal Coal Company as the assignee of the contract, did you?

A. No, sir.

Q. 14. In point of fact they dealt with you and shipped the coal directly to you all the time they shipped the coal?

A. Yes.

Q. 15. And you paid them for it?

A. Yes.

Q. 16. And the Federal Coal Company in turn paid you for it?

A. Yes.

[fol. 290] Q. 17. On the date that you were at Tracy City with Mr. Joe Thompson, having negotiations you referred to, was there any suggestion made that you heard, that the Tracy City Coal Company was insolvent and could not complete that contract?

A. No, sir, I didn't hear anything about that.

Q. 18. Did Mr. Thompson or Mr. Chrosniak or anyone else representing the Federal Coal Company ever offer to you as an excuse

for failing to pay you your commission or complete that Tracy City Coal Company contract, that the Tracy City Coal Company was insolvent?

A. No, sir.

Q. 19. Did they ever say to you that was the reason they cancelled the contract?

A. No, sir.

Q. 20. Did they ever offer that as an excuse or did you ever hear of such a thing until the last day or so?

A. No.

Q. 21. I will ask you if you ever heard of such suggestion until within the last three days?

A. No, sir.

Q. 22. I will ask you if you didn't many times demand of the Federal Coal Company the payment of your commissions?

A. Yes, sir.

Q. 23. And finally had to sue them for it?

A. Yes, sir.

Q. 24. I will ask you if on the date that you gentlemen were actually at Tracy City, the only question that prevented the closing [fol. 291] of that contract discussed that day was the amount of your commission?

A. That was my understanding.

Q. 25. I will ask you if you and Mr. Joe Thompson didn't go to a long distance phone and call up Mr. E. R. Thompson to discuss that matter?

— Mr. Joe Thompson talked to Mr. Thompson in a private booth; I was in the office and at times I heard part of the conversation.

Q. 26. Did you hear what Mr. Thompson said?

A. Not all, but part.

Q. 27. Did he tell Mr. E. R. Thompson what you demanded.

A. Yes, sir.

Q. 28. You demanded nothing more than the commissions you had contracted for?

A. No, I didn't demand that much.

Q. 29. What did you demand?

A. Fifteen cents per ton.

Q. 30. Did Mr. Joe Thompson tell that to Mr. E. R. Thompson?

A. Yes.

Q. 31. Did you hear Mr. E. R. Thompson's reply?

A. Seems like I heard him say he would not go into that arrangement.

Q. 32. Didn't you further hear him say you could go to Hell?

A. I would not say he said that.

Q. 33. Did you hear him say that?

A. No, Mr. Joe Thompson told me he said that.

Q. 34. Did you do it?

A. I haven't yet.

[fol. 292] Re-examination.

By C. C. Moore:

Q. 1. Mr. Bates, I will ask you whether or not during this contract of April 12th, Mr. Flanagan either in his own name, or any trade name of John D. Flanagan Coal Company, or the Cumberland Coal Company, or the Cumberland Mountain Coal Company, sold coal as a Broker at Tracy City?

A. Yes, sir, he did.

Q. 2. Did you, as the Chattanooga Coal Company buy some coal from him?

A. Yes, sir.

Q. 3. Was it much or little that you bought from him?

A. I don't think we bought any large amount from him.

Q. 4. Did you buy it under contract or spot sales at the market price?

A. The only thing we bought from him was some spot coal.

Q. 5. Did you pay the market price for the spot coal you bought from him?

A. Yes, sir.

Q. 6. Mr. Flanagan in giving his deposition in one of these two cases, has filed as Exhibit "L" his shipping record, showing coal dealt in by him as a Broker at Tracy City from June 1st until December 31st 1920, and this Exhibit shows that Mr. Flanagan sold to the Chattanooga Coal Company 12 cars in June, 3 cars in July, 3 cars in August and 10 cars in September. I will ask you whether [fol. 293] or not that approximately accords with your recollection as to the amount of coal that the Chattanooga Coal Company bought from Mr. Flanagan during those months?

A. I could not say that is the exact amount without checking my records.

Q. 7. This record shows the price at which it was sold to the Chattanooga Coal Company, showing that the first shipment in the first part of June was \$7.00, the last part of June at \$8.50 and in July, August and September at prices from \$8.50 up to \$9.75 per ton. State whether or not those prices accord with your recollection as to the prices you paid for that coal?

A. Yes, sir.

Q. 8. You were asked on your cross-examination as to the fact that you bought this coal, and that you re-sold the coal; that you paid for it and you collected for it, etc.; you were then asked about your commissions under your contract. I will now ask you whether or not that arrangement was a purchase and re-sale arrangement exclusively or was it an Agency arrangement by which you would buy the coal for the Federal Coal Company?

Mr. Lynch: That is a question of law for the court to construe, the contract now being before the court.

Counsel for Mr. Bates advises him to the same effect.

[fol. 294] Q. 9. Then in giving your answers on cross-examination, am I to understand that you did not mean to be understood as testifying to either a purchase and re-sale or to an Agency.

Mr. Lynch: The foregoing question is excepted to because the witness' testimony explains itself. He was not asked the question as to what this was, he was asked what statements were made to Mr. Flanagan and he was not in these questions asked to construe the contracts.

Mr. Moore: It is admitted the construction of the contract is for the court but what the witness intended to testify to in his cross-examination is proper for him to explain.

Mr. Lynch: He is your own witness and it is not proper to call on your own witness; there is no ambiguity in the testimony of the witness and it is improper to call on him to make such explanation.

Q. 10. Now, Mr. Bates, with all the exceptions in, I will ask you whether you will answer the question or not, and before answering, I will ask you to consult with your own lawyer, who is present, and who represents you in the matter, and to formulate your answer so it will not prejudice your rights one way or the other?

A. In answering these questions, I don't intend to construe the contract but merely answered the questions as they were asked.

Q. 11. Then you were merely testifying what the dealings were as [fol. 295] actually taking place between the parties; that is, as to the fact of the making of the contract and billing and shipping of the coal, and do not mean to be understood as attempting to construe the legal question of the contract,—is that right?

A. Yes, sir.

Q. 12. Mr. Bates, you have stated that you wrote several letters in an effort to secure the shipment of this coal under the April 12th 1920 contract. I will ask you to please file carbon copies of the letters, if you have them, or can find them, that you wrote on that subject?

Exhibit 1

Mr. Stanfield (representing Mr. Bates) : I want to look over those letters myself before they are filed and you can say to him, Mr. Bates, you will consult with your counsel and let him know later.

A. If my counsel approves, I will file them.

Mr. Lynch: Counsel for complainant Flanagan states they have no sort of objection, it is a matter purely with the witness and his counsel.

Q. 13. If, after consulting with your Counsel, Mr. Bates, you determine not to file the letters, I will ask you to, by consultation of your Counsel, write out the reasons why you decline to file them and attach that in lieu of the copies of the letters, will you do that?

Mr. Stanfield (representing Mr. Bates): Representing Mr. Bates, I will say that he will probably act on the advise of his counsel, that his reason for not filing them will be the advise of his counsel.

[fol. 296] Q. 14. And I am asking that if your Counsel advise you not to file them, that you state what reason your Counsel gives why they should not be filed?

Mr. Stanfield (representing Mr. Bates): Any conversation between Mr. Bates and his counsel would be of a private nature and not suppose to be written into the record.

Q. 15. Then I will ask you, independent of what your Counsel tells you, after you have fully consulted with your Counsel, to give the reason why you are not filing them, if you don't will you agree to do that, and your Counsel can answer?

A. I could not agree to do that without the consent of my Counsel.

Mr. Lynch: Counsel for complainant states that without interfering or seeking to infringe on the relationship between counsel and client, he joins counsel for defendant in requesting the production of these letters if consistent with the views of counsel for the witness.

Q. 16. I will next ask you in what way you paid for the coal that was delivered under that contract, by cash or check or otherwise?

A. Paid for it with checks.

Q. 17. Do you remember as to whom those checks were made payable?

A. Tracy City Coal Company.

Q. 18. And to whom did you send the checks?

A. Tracy City Coal Company, Tracy City, Tenn.

[fol. 297] Q. 19. Have you the cancelled checks in your possession now?

A. Really I don't know whether I have them or not, but I think I have.

Q. 20. I will ask you to look to these checks, and particularly the endorsement on them, and if they are all similarly endorsed, then file one as illustrative of the checks and endorsements.

If you find them differently endorsed, file samples showing the different endorsements that may be upon the back of the different checks, and marked them Exhibit Nos. 2, 3, 4, and so on.

A. Yes, sir, I will.

Exhibit No. 2, etc.

Recross-examination.

By Judge J. J. Lynch:

Q. 1. How long have you been in the coal business in this section?

A. Little over 9 years.

Q. 2. I will ask you whether or not you have been actively engaged as coal dealer and Broker?

A. I have.

Q. 3. I will ask you if you know any special significance to the coal trade in the expression "go ahead and bust yourself?"

A. No, sir.

Q. 4. I will ask you if you ever heard of that expression meaning to go ahead and ship coal, or anything like that?

A. I never heard of it having any special significance.

Re-examination.

By C. C. Moore:

[fol. 298] Q. 1. Were you formerly employed by the Federal Coal Company?

A. Yes, sir.

Q. 2. About when did you leave the employe of the Federal Coal Company?

A. I don't remember, it was 1918 or 1919.

Q. 3. The coal Brokerage business you have done on your own account has been after you left the Federal Coal Company, has it not?

A. Yes, sir.

And further this deponent saith not.

By Bessie M. Gorman, Stenographer.

Sworn to before me this the 7th day of April 1922. —
—, Notary Public.

[fol. 299]

April 15th, 1922.

JOHN CHROSNIAK, being introduced by agreement, for further examination, deposed as follows:

Direct examination.

By C. C. More:

Q. 1. Mr. Chrosniak, you have been examined and re-examined several times in this case, I believe?

A. Yes, sir.

Q. 2. In the testimony given by Mr. Flanagan with respect to conversation had over the telephone from Tracy City to the office of the Federal Coal Company, which he thought was had with Mr. Thompson, and which shows he had sometimes with you, I will ask you whether or not in any of the conversations that you had with Mr. Flanagan with respect to the contract now in dispute, and the delivery of the coal under that contract, now in dispute, anything was said by Mr. Flanagan or by yourself in any way, with respect to

making up any back shipments; at the time of the conversation, or before the delinquency under the contract; state how that was?

A. No, sir, I had some conversation with Mr. Flanagan over the telephone and that fact was never mentioned.

Q. 2. Was it mentioned either by you or Mr. Flanagan?

A. No, sir.

[fol. 300] And further this deponent saith not.

Signature Waived. John Chrosniak. Previously Sworn to.

Next witness, E. R. THOMPSON, being recalled for further examination, deposed as follows:

Direct examination.

By C. C. Moore:

Q. 1. Mr. Thompson, I believe you have also been examined and re-examined more than once in this case?

A. On several occasions, yes, sir.

Q. 2. In respect to the delivery of this coal under the contract of August 19th 1920, I will ask you whether or not at any time in any conversation had between you and Mr. Flanagan, anything was said or any agreement was entered into by which the Federal Coal Company agreed to make up any back shipments then delinquent?

A. It was not mentioned at any time by me or any one else to me. We did not at any time make an agreement to make up shipments as far as I remember, and I am pretty certain it didn't happen.

Q. 3. Mr. Thompson, I am not sure whether I have heretofore asked you with respect to the primary business done by the Federal Coal Company and will ask you now, what was its primary business?

A. Operation of coal mines.

[fol. 301] Q. 4. Where are its mines situated?

A. Bell County, Ky.

Q. 5. About what was the daily output of its mines in 1920?

A. About 1,000 or 1,500 tons.

Q. 6. Were these mines being operated during 1920?

A. Yes, sir.

Q. 7. The Federal Coal Company sold its own coal as produced at these mines?

A. Yes.

Q. 8. Did you have charge of that?

A. Yes.

Q. 9. State whether or not the Federal Coal Company had been engaged in that business some time before 1920?

A. Yes, the Federal Coal Company is the outgrowth of other corporations which were operating the same mines prior to the existence of the Federal Coal Company, and who had been operating mines for the last seven years.

Q. 10. I will ask you whether or not during the period of time that these mines had been operated, from time to time, the Federal Coal Company has found it necessary to buy coal to supply temporary wants of its customers?

A. Yes, sir, that happens when the demand is strong; when the demand is weak like it has been for the last year, it is hard to sell our own coal, concentrating our efforts on that; when the demand gets strong our other established trade will take and acquire a great deal [fol. 302] more than we produce at our mines.

Q. 11. State whether or not in 1920 there was a strong demand for coal?

A. There was a very strong demand.

Q. 12. State whether or not in 1920 the Federal Coal Company did buy a considerable amount of coal?

A. Yes, sir, on account of a very strong market, the volume of business done was almost wholly controlled by ability to ship coal; consequently the buying proposition with us, and our ability to buy the coal was the measure of the business which we could do.

Q. 13. During that time did the Federal Coal Company keep its operative offices in Kentucky?

A. Yes, sir.

Q. 14. And kept also an office at Chattanooga, Tenn.?

A. Yes, sir.

Q. 15. State whether or not during 1920 the Federal Coal Company engaged in the business of selling coal in Tennessee, particularly coal which it had purchased?

A. No, sir, we did not. Tennessee is not nominally a market we reach, excepting Knoxville and Memphis for domestic coal, which we produce at our own mines. As a general proposition we sell no coal in Tennessee except a little domestic coal which we ship from Southeastern Kentucky to Knoxville, and Memphis, and at times, we have shipped a little to Chattanooga.

Q. 16. For what purpose was this coal purchased from Mr. Flanagan and the Chattanooga Coal Company, and others from the Tracy [fol. 303] City district, during that period?

A. We exported a good deal to our trade in Georgia and South Carolina.

Q. 17. Did you have any reason for not wanting to sell any of that coal in the Chattanooga territory?

A. We had a very strong reason for not wanting to sell any coal in the Chattanooga territory.

Q. 18. What was the reason?

A. During approximately all that period General Kennery was very active in trying to prosecute the coalmen, and he had a representative in this territory who was tracing shipments going to the consignees and securing from them the bills-of-lading and invoices covering these shipments of coal, it being his idea to prosecute the seller, and for that reason we made it a point to do approximately no business within the territory that he and his assistants were available.

Q. 19. State whether or not there were any exceptions to your rule

of business not to all any coal in this territory, if so, explain in such exception?

A. I looked that up this morning, and I found that there were two exceptions to this rule. We sold the Miller Ice & Coal Company, in Chattanooga three cars of coal, which came up in a more or less accidental way. Mr. C. M. Preston who is the Vice-President of the Hamilton National Bank told me that the Miller Ice & Coal Company had asked him to help them get some coal. They were not able to get any and needed some, and he asked me to, if possible, [fol. 304] supply them with a few cars of coal. As the result of his request we shipped them three cars of coal, two of them coming from Tracy City and one coming from the neighborhood of Harri-man. I also found on our records the fact we sold the Chattanooga Coal Company about five cars of coal which was shipped by the Tennessee Consolidated Coal & Iron Company. Mr. Bates of the Chattanooga Coal Company wanted especially to get a few cars of coal produced by that Company and for some reason was unable to buy it himself. He came to our office and asked me to buy the coal for him, which we did. I think there were five cars in that last transaction.

Q. 20. Was the Bates purchase one transaction?

A. Yes, sir, one transaction.

Q. 21. And was the Miller Ice & Coal Company one transaction?

A. So far as I now remember, it was.

And further this deponent saith not.

Signature waived. E. R. Thompson. Previously Sworn to.

[fol. 305] EXHIBIT "I" TO DEPOSITION JOHN CHROSNIAK

Whereas, under date of April —, 1920, the Tracy City Coal Company, T. O. Busbee, Acting Agent, and the Chattanooga Coal Company, W. S. Bates, proprietor, entered into a contract for the sale and purchase of approximately 18,000 tons of Tracy City straight run of mine coal, at and for the price of \$3.90 per net ton of 2,000 pounds f. o. b. cars at mines, which contract was duly approved by the officers of the Tracy City Coal Company; and

Whereas, the Chattanooga Coal Company, W. S. Bates, proprietor, in turn re-sold said coal to the Federal Coal Company of Chattanooga, Tennessee at and for a profit to the said Chattanooga Coal Company, and said Federal Coal Company has in its turn contracted for the resale of said coal at a substantial profit over and above the price which it has agreed to pay said Chattanooga Coal Company therefor; and

Whereas, the Tracy City Coal Company has been unable to fulfill its part of said contract, and said Chattanooga Coal Company, M. S. Bates, proprietor, and said Federal Coal Company are both making claims against the said Tracy City Coal Company for damages which they allege they have sustained by reason of said failure on the part of the Tracy City Coal Company to deliver said coal as provided in said contract, and

Whereas, by virtue of certain contracts heretofore entered into the Campbell Branch Coal Company and John D. Flanagan, Tracy City, Tennessee, have an interest in the performance of the contract entered into by the Tracy City Coal Company, and any claim which may be presented on account of the alleged breach thereof; and

Whereas, all the parties hereto have met and entered into an agreement for the compromise and settlement of any and all differences or claims arising or existing under or by virtue of said contract hereinbefore referred to:

Now Therefore, in consideration of the premises, it is mutually understood and agreed by and between the parties as follows, to wit:

(1) The Federal Coal Company, Chattanooga, Tennessee is hereby constituted the exclusive selling agent of the Tracy City Coal Company, the Campbell Branch Coal Company, and John D. Flanagan, [fol. 306] under whatever name or style said Flanagan may operate. The Federal Coal Company is to receive all coal which may be mined by the Tracy City Coal Company, the Campbell Branch Coal Company, and John D. Flanagan, and any and all coal which may be purchased by said parties in the open market, except such coal as the Tracy City Coal Company may be required to furnish to the N. C. & St. L. Railway Company under existing contracts.

(2) The Federal Coal Company is to employ its selling forces in the sale of such coal, and is to sell same at the highest market price obtainable, selling same on the spot market from time to time. However, the Federal Coal Company may make contracts from time to time for specified amounts of such coal as may be shipped to it by the Tracy City Coal Company, the Campbell Branch Coal Company, or John D. Flanagan, at such prices as may be satisfactory to John D. Flanagan, who is authorized to act in this respect on behalf of the Tracy City Coal Company and the Campbell Branch Coal Company.

(3) It is agreed that coal shall be shipped as hereinbefore provided during the period beginning July 15, 1920 and ending June 15, 1921, at the rate of not less than 40 cars in any one month—not less than five cars in any one week—until a total tonnage of not less than 17,000 tons shall have been shipped hereunder.

(4) The Federal Coal Company shall receive as its compensation for selling the coal to be shipped hereunder the sum of sixty (60) cents upon each and every ton of coal so shipped, which shall be deducted from the price obtained therefor by said Federal Coal Company in its settlements with the Tracy City Coal Company, the Campbell Branch Coal Company and John D. Flanagan.

(5) The Federal Coal Company shall not purchase coal in the Tracy City market for other miners or operators at a price greater than that which it will be required to pay for the coal to be shipped hereunder, the selling commission or charge of 60 cents per ton included. However, the Federal Coal Company reserves the right to contract for or purchase coal produced by the Tennessee Consolidated

Coal Company upon such terms and conditions as may be agreed upon by said Federal Coal Company and said Tennessee Consolidated Coal Company, it being understood by the parties hereto that the [fol. 307] foregoing provisions of this paragraph shall in no wise apply to or control the relations now or hereafter existing between said Federal Coal Company and said Tennessee Consolidated Coal Company.

(6) Remittance is to be made on the first of each week in full for the previous week's shipments.

(7) In event the Federal Coal Company shall default or fail to comply with the terms of this agreement, or any of them, to make payments for coal shipped as and when such payments become due, the other parties hereto may at their option, without notice, suspend shipments hereunder or cancel this agreement without being liable for any claims or damages of any nature whatever; and failure to exercise such option in any instance shall not be construed as waiving the right thereafter.

(8) If the credit of the Federal Coal Company shall, at any time, in the reasonable judgment of the other parties hereto, become impaired, then the other parties hereto may require the Federal Coal Company to furnish adequate security for the performance of the contract on its part, or upon its failure so to do, may declare the contract at an end, without incurring any further liability hereunder.

(9) The Tracy City Coal Company, the Campbell Branch Coal Company and John D. Flanagan shall not be responsible for delivery of shipments hereunder if prevented by strikes or combination of miners or laborers, accidents in mines or otherwise, fire or flooding, interruption of transportation, failure of car supply, special or general, or from any cause beyond said parties' control. In such cases the obligation to deliver coal hereunder is limited and qualified to such extent as deliveries may be prevented thereby, and no liability shall be incurred for any damages resulting therefrom. The Federal Coal Company will not be required to receive coal hereunder, except at the market price, as may obtain generally and from day to day.

(10) The Chattanooga Coal Company, W. S. Bates, proprietor, has entered into an agreement with the Federal Coal Company, whereby it is to receive a certain percentage or share of the selling charge of commission herein provided for; and in consideration of the premises the Chattanooga Coal Company, W. S. Bates, proprietor, and the Federal Coal Company hereby release and relinquish any and all claim which they may have against any and all of the other parties hereto by reason of the execution of the contract between the Tracy City Coal Company and the Chattanooga Coal Company, hereinbefore referred to. In the event, however, the other parties hereto, to-wit: the Tracy City Coal Company, the Campbell Branch Coal Company, and John D. Flanagan, should breach the terms of this contract, then the parties hereto shall resume their status quo and the Chattanooga Coal Company, W. S. Bates, proprietor, and the Federal Coal

Company shall be deemed, treated and considered as having all rights and remedies they would have had had this contract not been entered into.

(11) In event a total of more than 40 cars should be shipped in any month hereunder, then such excess shall be applied in reduction of any shortage in tonnage or car shipments which has heretofore occurred or which may thereafter occur; but the parties hereto are not to be excused from shipping not less than 40 cars per month, except under the terms and conditions hereinbefore set forth.

In witness whereof the parties hereto have signed their names, this the 15th day of July, 1920.

Tracy City Coal Company, By — — —, President. Campbell Branch Coal Company, By — — —, President. Chattanooga Coal Company, By — — —, Proprietor. Federal Coal Company, By — — —, Sec. & Treasurer.

[fol. 309] EXHIBIT No. "2" TO JOHN CHROSNIAK

Whereas, under date of April —, 1920, the Tracy City Coal Company, T. O. Busbee, Acting Agent, and the Chattanooga Coal Company, W. S. Bates, proprietor, entered into a contract for the sale and purchase of approximately 18,000 tons of Tracy City straight run of mine coal, at and for the price of \$3.90 per net ton of 2,000 pounds f. o. b. cars at mines, which contract was duly approved by the officers of the Tracy City Coal Company; and

Whereas, the Chattanooga Coal Company, W. S. Bates, proprietor, in turn resold said coal to the Federal Coal Company, of Chattanooga, Tennessee, at and for a profit to the said Chattanooga Coal Company, and said Federal Coal Company has in its turn contracted for the resale of said coal at a substantial profit over and above the price which it has agreed to pay said Chattanooga Coal Company therefor; and

Whereas, the Tracy City Coal Company has been unable to fulfill its part of said contract, and said Chattanooga Coal Company, W. S. Bates, proprietor, and said Federal Coal Company are both making claims against said Tracy City Coal Company for damages which they allege they have sustained by reason of said failure on the part of the Tracy City Coal Company to deliver said coal as provided in said contract; and

Whereas, by virtue of certain contracts heretofore entered into the Campbell Branch Coal Company and John D. Flanagan, Tracy City, Tennessee, have an interest in the performance of the contract entered into by the Tracy City Coal Company, and any claim which may be presented on account of the alleged breach thereof; and

Whereas, all the parties hereto have met and entered into an agreement for the compromise and settlement of any and all differences or claims arising or existing under or by virtue of said contract hereinbefore referred to:

Now therefore, in consideration of the premises, it is mutually understood and agreed by and between the parties as follows, to wit:

(1) The Federal Coal Company, Chattanooga, Tennessee, is hereby constituted the exclusive selling agent of the Tracy City Coal Company, the Campbell Branch Coal Company, and John D. Flanagan, [fol. 310] under whatever name or style said Flanagan may operate. The Federal Coal Company is to receive all coal which may be mined by the Tracy City Coal Company, the Campbell Branch Coal Company, and John D. Flanagan, and any and all coal which may be purchased by said parties in the open market, except such coal as the Tracy City Coal Company may be required to furnish the N. C. & St. L. Railway Company under existing contracts.

(2) The Federal Coal Company is to employ its selling forces in the sale of such coal, and is to sell at the highest market price obtainable, selling same on the spot market from time to time. However, the Federal Coal Company may make contracts from time to time for specified amounts of such coal as may be shipped to it by the Tracy City Coal Company, the Campbell Branch Coal Company, or John D. Flanagan, at such prices as may be satisfactory to John D. Flanagan, who is authorized to act in this respect on behalf of the Tracy City Coal Company and Campbell Branch Coal Company.

(3) It is agreed that coal shall be shipped as hereinbefore provided during the period beginning July 15, 1920 and ending June 15, 1921, at the rate of not less than 40 cars in any one month—not less than five cars in any one week—until a total tonnage of not less than 17,000 tons shall have been shipped hereunder.

(4) The Federal Coal Company shall receive as its compensation for selling the coal to be shipped hereunder the sum of sixty (60) cents upon each and every ton of coal so shipped, which shall be deducted from the price obtained therefor by said Federal Coal Company in its settlements with the Tracy City Coal Company, the Campbell Branch Coal Company, and John D. Flanagan.

(5) The Federal Coal Company shall not purchase coal in the Tracy City market from other miners or operators at a price greater than that which it will be required to pay for the coal to be shipped hereunder, the selling commission or charge of 60 cents per ton included. However, the Federal Coal Company expressly reserves the right to contract for or purchase coal produced by the Tennessee Consolidated Coal Company upon such terms and conditions as may be agreed upon by said Federal Coal Company and said Tennessee [fol. 311] Consolidated Coal Company, it being understood by the parties hereto that the foregoing provisions of this paragraph shall in no wise apply to or control the relations now or hereafter existing between said Federal Coal Company and said Tennessee Consolidated Coal Company.

(6) Remittance is to be made on the first of each week in full for the previous week's shipments.

(7) In event the Federal Coal Company should default or fail to comply with the terms of this agreement, or any of them, to make payments for coal shipped as and when such payments become due, the other parties may at their option, without notice, suspend shipments hereunder or cancel this agreement without being liable for any claims for damages of any nature whatever; and failure to exercise such option in any instance shall not be construed as waiving the right thereafter.

(8) If the credit of the Federal Coal Company shall, at any time, in the reasonable judgment of the other parties hereto, become impaired, then the other parties hereto may require the Federal Coal Company to furnish adequate security for the performance of the contract on its part, or upon its failure so to do, may declare the contract at an end, without incurring any further liability hereunder.

(9) The Tracy City Coal Company, the Campbell Branch Coal Company and John D. Flanagan shall not be responsible for delivery of shipments hereunder if prevented by strikes or combination of miners or laborers, accidents in mines or otherwise, fire or flooding, interruption of transportation, failure of car supply, special or general, or from any cause beyond said parties' control. In such cases the obligation to deliver coal hereunder is limited and qualified to such extent as deliveries may be prevented thereby, and no liability shall be incurred for any damages resulting therefrom. The Federal Coal Company will not be required to receive coal hereunder, except at the market price, as may obtain generally and from day to day.

(10) The Chattanooga Coal Company, W. S. Bates, proprietor, has entered into an arrangement with the Federal Coal Company. [fol. 312] whereby it is to receive a certain percentage or share of the selling charge of commission herein provided for; and in consideration of the premises the Chattanooga Coal Company, W. S. Bates, proprietor, and the Federal Coal Company hereby release and relinquish any and all claim which they may have against any and all of the other parties hereto by reason of the execution of the contract between the Tracy City Coal Company and the Chattanooga Coal Company, hereinbefore referred to. In the event, however, the other parties hereto, to-wit: The Tracy City Coal Company, the Campbell Branch Coal Company and John D. Flanagan, shall breach the terms of this contract, then the parties hereto shall resume their status quo, and the Chattanooga Coal Company, W. S. Bates, proprietor, and the Federal Coal Company shall be deemed, treated and considered as having all the rights and remedies they would have had had this contract not been entered into.

(11) In event a total of more than 40 cars should be shipped in any one month hereunder, then such excess shall be applied in reduction of any shortage in tonnage or car shipments which has theretofore occurred or which may thereafter occur; but the parties hereto are not to be excused from shipping not less than 40 cars per month, except under the terms and conditions hereinbefore set forth.

In witness whereof, the parties hereto have signed their names, this the 15th day of July, 1920.

Tracy City Coal Company, By ———, President. Campbell Branch Coal Company, By ———, President. Chattanooga Coal Company, By ———, Proprietor. Federal Coal Company, By ———, Sec. & Treas.

[fol. 313]

July 8th, 1920.

Federal Coal Co. et al. v. Tracy City Coal Company

John D. Flanagan, Esq.,
Tracy City, Tennessee.

MY DEAR MR. FLANAGAN :

An interview has been had this morning between my brother E. R. Thompson of the Federal Coal Company, and Mr. Bates and his attorney, and the Federal Coal Company and the Chattanooga Coal Company have not yet been able to reach an agreement as to the basis upon which a division shall be made of the 60 cents selling charge provided for in the tentative contract which was drawn up by us on yesterday. They are now pretty far apart, but I hope they will eventually get together. If they get together, the contract can then be entered into, and if they do not get together we will of course be just where we started from when we began our negotiations on yesterday morning.

The contract as drawn up on yesterday is satisfactory to the Federal Coal Company, except paragraph (5) thereof, with respect to the purchase of coal from other dealers in Tracy City, by the Federal Coal Company. The Federal Coal Company has been dealing with the Tennessee Consolidated Coal Company for some time, and we understand some contracts are now in force, or are expected to be entered into very shortly. We have therefore rewritten the contract exactly as submitted to you and Judge Garner on yesterday, except that we have added to paragraph (5) immediately after the words "per ton included" the following, to-wit:

"However, the Federal Coal Company expressly reserves the right to contract for or purchase coal produced by the Tennessee Consolidated Coal Company upon such terms and conditions as may be agreed upon by said Federal Coal Company and said Tennessee Consolidated Coal Company, it being understood by the parties hereto that the foregoing provisions of this paragraph shall in no wise apply to or control the relations now or hereafter existing between said Federal Coal Company and said Tennessee Consolidated Coal Company."

[fol. 314] I understand from my brother that if this contract is finally entered into he will not expect to purchase any coal in the open market in Tracy City, so long as the terms of the contract are complied with on your part. That is, he will not purchase any coal

in Tracy City except from the Tennessee Consolidated Coal Company. I understand that you do not obtain any part of your tonnage from this concern and this provision should, therefore, not be objectionable to you.

As I stated to you in person yesterday, I am leaving tomorrow morning for a little vacation trip. However, my absence will not prevent the entering into the proposed contract, in event the Federal Coal Company and the Chattanooga Coal Company can get together along the lines above referred to, and if they do not succeed in getting together you will of course hear from the Federal Coal Company very promptly. I regret that this little hitch has arisen and hope the matter will yet be adjusted to the satisfaction of the parties at this end of the line.

With kind personal regards, I am

Yours very truly, ———.

EXHIBIT "1" TO E. R. THOMPSON

Chattanooga, Tenn., April 3rd, 1920.

GENTLEMEN:

At present we have a small tonnage of Alabama, Tennessee and Kentucky coals to offer you on contract and spot shipment, and believe prices will interest you, especially on the contract coal, in view of the recent agreement with the miners, which fixed wages for the next two years.

150 tons daily Paint Rock M/R CNO&TP Ry.....	\$4.00
100 " " Tracy City " NC&StL Ry.....	4.00
15 cars Middlesboro, Ky. M/R Sou Ry.....	4.75
15 " Blue Gem M/R L & N.....	5.00
25 " Glen Mary M/R CMO&TP.....	4.75
[fol. 315] 15 cars Cahaba Alabama M/R L&N or Sou Ry....	4.75
5 cars Domino Alabama Nut L&N Ry.....	4.75
5 " America Pratt Lump L&N Ry.....	5.00
10 " " " Washed Stm. L&N Ry.....	4.25
10 " " " M/R L&N Ry.....	4.50

These prices are per ton, 2,000#, f. o. b. cars at the mines, and are quoted for prompt acceptance, subject to prior sale. Regular freight rates applying.

With the exception of the Paint Rock and the Tracy City, quotations are for shipment in April. The prices on the Paint Rock and the Tracy City coals are for twelve months' contract on equal monthly shipments.

In view of the final adjustment of the wage controversy and the 27% increase, we feel that you will save money by contracting for the Paint Rock or Tracy City coal now, and at the same time this will insure your coal supply for the next twelve months.

Assuring you that we will appreciate the opportunity of serving you at all times, and suggesting that you wire us immediately if interested, we are,

Yours very truly, United States Fuel Corporation.

EXHIBIT #2, E. R. THOMPSON

Period	Toggage short	Contract price	Market price	Dif. per ton		Flanagan's average selling price
Apr. 15-21, '20.....	287.20	3.90	4.40	.50	....	143.60
22-28	118.25	3.90	4.40	.50	....	59.12
Apr. 29th to 5/4....	83.15	3.90	7.00	3.10	....	257.76
May 5-11.....	246.30	3.90	7.00	3.10	....	1,072.60
" 12-18	346.00	3.90	7.00	3.10	....	788.64
" 26-31	391.10	3.90	7.00	3.10	....	923.41
June	1,547.80	3.90	8.50	4.60	7.85	7,119.88
July	1,547.80	3.90	9.50	5.60	8.73	8,667.68
August	1,547.80	3.90	10.50	6.60	9.71	10,215.48
September	1,547.80	3.90	9.00	5.10	8.04	7,893.78
October	1,547.80	3.90	7.75	3.85	6.40	5,959.03
[fol. 316] November	1,547.80	3.90	6.50	2.60	5.05	4,024.28
December	1,547.80	3.90	4.00	.10	4.11	154.78
						48,053.57
1921.						
January	1,547.80	3.90	2.00	1.90	....	2,940.82
February	1,547.80	3.90	2.00	1.90	....	2,940.82
March	1,547.80	3.90	2.00	1.90	....	2,940.82
						8,822.46
Shipped.....	785.60					48,053.57
Contract	18,000.00					8,822.46
						39,231.11

52 weeks—18,000 tons—346 tons per week.

Prices shown in "market" column are prices at which we actually sold to our customers coal from this same field and of similar quality to that covered by this contract, excepting the month of November and subsequently. We sold no coal from this field after October 31, 1920. November prices represent sales from other fields of coal some what similar in quality. Subsequent to November prices are based on information and belief.

EXHIBIT 3 TO E. R. THOMPSON

15 cars actually shipped on the contract of April 12, 1920, containing a total of 785.60 tons.

Average 52.37 tons per car.

[fol. 317]

[Title omitted]

Depositions of E. R. Thompson, John Chrosniak, Miss Winfred Smith, and Mrs. Luther Talley, taken by agreement at the office of Judge J. J. Lynch, First National Bank Bldg., Chattanooga, Tenn., on March 29th, 1922, all formalities being waived.

First witness, E. R. THOMPSON, being duly sworn, deposed as follows:

Direct examination.

By C. C. Moore:

Q. 1. Mr. Thompson, are you the same E. R. Thompson whose deposition was heretofore taken by the complainant in this case?

A. I am.

Q. 2. During the year 1920 and up to the present time what has [fol. 318] been, and is, your position with the Federal Coal Company?

A. Secretary & Treasurer.

Q. 3. Who is the president of that company?

A. T. R. Preston.

Q. 4. What is its business and what was its business during 1920?

A. Operation of coal mines.

Q. 5. Where are its mines situated?

A. In Bell County, southeastern Kentucky.

Q. 6. How many coal mines does it operate?

A. A total of six during that time, they are not all being operated at the present moment.

Q. 7. What was the daily capacity of the six mines operated at that time?

A. About 1,000 tons.

Q. 8. Mr. Thompson, I will ask you what training and experience you have had as an Accountant?

A. I have had probably 15 years experience, devoted a good deal of study to it, and passed examination by the State Board; at the present I am a member of the State Board Accountants.

Q. 9. I will ask you whether or not since the deposition of complainant John D. Flanagan was given, you have gone over the exhibits filed by Mr. Flanagan to that deposition, and made up a statement from his records as to the coal handled by him during different periods?

A. I have.

Q. 10. Please look to this statement and say whether this is the statement you prepared, and explain the statement?

[fol. 319] A. It is the statement which I have prepared. I have in the first place tabulated all the sales which he made, as shown by his sheets, during that period, which was June to December, 1920, both inclusive. This shows that he handled a total of 33,368.15 tons, during that time and that his gross sales were \$252,273.75. The next tabulation shows the shipments which he made during 1920 after Sep-

tember 18, 1920, and this shows that from September 18th to December 31st, inclusive, he sold and shipped 18,895.29 tons, receiving for them, \$121,064.79. This includes shipments which he made on the contract with us. The next is a tabulation showing the shipments which he made after September 18th, 1920, and not including shipments on Federal Coal Company. This shows that during that period, September 18th, to December 31st, 1920, he shipped outside of contract with us, 16,028.62 tons; these sales amounted to \$96,047.47. The last thing I have is the average selling price for each month, beginning with the month of September, and these average sales prices are as follows:

September	\$8.04
October	6.49
November	5.05
December	4.11

These average prices do not include any shipments made to the Federal Coal Company on their contract.

Q. 11. Does this statement that you have just explained correctly [fol. 320] reflect the facts as given on the Exhibit of Mr. Flanagan to his deposition on file in this case, Exhibit 1?

A. It does.

Q. 12. Will you please file the statement that you have just explained as Exhibit No. 1 to this, your deposition?

I do.

Exhibit No. 1.

Q. 13. You have said that the last tabulation, of average selling prices, does not include the coal shipped to the Federal Coal Company under contract that is sued on in this case. I will ask you to say whether or not if the coal shipped to the Federal Coal Company under that contract had been included these average prices would be higher than here shown?

A. They would be considerably higher, yes, sir.

Q. 14. State whether or not this Exhibit to the deposition of Mr. Flanagan, from which you have made up your statement is the character of records that is usually kept by Brokers of Coal dealers, covering the information shown on the Exhibit?

A. Yes, sir, it is of the general character used.

Q. 15. Does this Exhibit show the sources or persons from whom Mr. Flanagan purchased the coal that he shipped from day to day?

A. Yes, sir.

Q. 16. Are you familiar with the practice of coal Brokers in buying and selling coal?

A. Yes, sir.

[fol. 321] Q. 17. What is their practice with respect to buying and selling; that is, do they buy in stock, or do they buy and sell usually so that the car will move from their purchaser to their customer?

A. In most cases it moves direct from the person from whom they

buy it to the person to whom they sell it; they never stock it because that would involve handling charges. It is always continuous moving from the mine to destination, if it is hauled any where it is hauled in the car and held by the Railroad Company.

Q. 18. Does this Exhibit show the price of Mr. Flanagan paid for that coal, as well as the price he sold it at?

A. In most cases; there are some exceptions to that, however. If I remember correctly one month it has nothing on it at all and there are some individual cars.

Q. 19. Which one is it that seems to be different from the rest?

A. The month of November had nothing at all about the price he paid for the coal.

Q. 20. Is the month of November, as shown on that Exhibit, the form that is usually used by Brokers for records of this kind?

A. No sir, it appears on some leaves taken out of a blank book.

Q. 21. Do the months previous to November appear to be original records?

A. They have the general appearance of original records, yet there are some things about them that you would think maybe they [fol. 322] were not.

Q. 22. How about the month of November as included in that Exhibit?

A. I would off-hand pass it as not an original record of his transaction, because he has nothing on here to show what was paid for the coal at all. In other words, he only has a record of who he sold it to, the price at which he sold it, and he would need to put on his books certainly what he paid for the coal.

Q. 23. State whether or not these sheets for November appear to be new, clean sheets, all in the same hand-writing, with the same pen and with the same ink, and make at the same time?

A. That is true. They are, you might say, not messed up like the others sheets which bear the ear-marks of having been handled considerably more. None of these sheets are totaled up in the customary way which is necessary with original records of this kind in order to put the information on the general books, as to total purchases and things of that kind.

Q. 24. You were asked by complainant's Counsel on your previous deposition to file as Exhibit "A" a statement of all the coal shipped to the Federal Coal Company by complainant under the contract in suit. State whether or not you have prepared and filed such Exhibit?

[fol. 323] A. I have.

Q. 25. Please take the Exhibit which you have prepared and explain what it shows?

A. It shows the dates each car was shipped—

Q. 26. The dates running during what month?

A. From the first day of September to the last day of December, 1920, both inclusive. It shows the initial and number of each car, number of tons contained in each car, price at which we credited Mr. Flanagan, and the amount of that credit, customer to whom we

sold the coal, the price per ton for which we received for the coal, and the amount which we charged each customer.

Q. 27. How many cars were shipped during the month of September by Mr. Flanagan to the Federal Coal Company under the contract in suit?

A. Thirty-six.

Q. 28. How many during the month of October?

A. Seven.

Q. 29. How many during the month of November?

A. Fourteen.

Q. 30. How many during the month of December 1920?

A. Sixteen.

Q. 31. Were these cars that were shipped by Mr. Flanagan received by the Federal Coal Company on the dates that appear in the left hand column of this statement?

A. That is suppose to be the date the car was shipped, the date of the bill-of-lading.

Q. 32. From what was that date entered upon your record?
[fol. 324] A. From invoices received from Mr. Flanagan.

Q. 33. That would be the date of his invoice or the date shown on the invoice as shipping date?

A. If he makes out an invoice and dates it September first that is supposed to be the date the car moves, and in nearly every case corresponds with the bill-of-lading.

Q. 34. This coal, I believe, all originated at or near Tracy City?

A. Yes, sir.

Q. 35. This statement shows that the last car shipped by Mr. Flanagan under this contract was shipped or at least invoiced by him on December 31st. being Central of Georgia 20244, about when, in the usual course of time would that car reach Chattanooga?

A. Say about two days later.

Q. 36. That would be in the first days of January, 1921?

A. Yes, sir.

Q. 37. I notice on this statement beginning with the 4th day of November, 1920, the price credited to Mr. Flanagan is \$8.50 per ton, whereas preceding that date the price credited is \$9.00 per ton. Please explain why this reduction of price was credited on your records?

A. We had a certain piece of business and my impression is, that Mr. Crosniak told him he could ship on that if he would take \$8.50 for the coal, to which he agreed.

[fol. 325] Q. 38. That coal all seemed to have been charged to the Emmons Coal Mining Company at \$9.00 per ton?

A. Yes, sir.

Q. 39. Do you recall in what form Mr. Flanagan signified his consent to the reduction in price of this coal?

A. I am pretty sure he didn't signify it to me at all; I remember Mr. Chrosniak told me—

Q. 40. During that date did Mr. Flanagan bill the coal to you at \$8.50 instead of \$9.00 as previously?

A. Yes, sir.

Q. 41. During the continuance of this contract, did complainant Flanagan write to the Federal Coal Company any letters of any kind about the contract?

A. No, sir.

Q. 42. Did he communicate with the Federal Coal Company in any way by mail during that period?

A. Mailed invoices, statements and things of that kind, but I am pretty sure no letters were received during that period.

Q. 43. Your statement, Exhibit "A" shows that during the month of September 1920, the Federal Coal Company received only 36 cars, whereas the contract stipulates for 50 cars. Why was not 50 cars shipped during that month?

A. No reason as far as we were concerned, during September we were handling coal very nicely, in fact Mr. Flanagan had an open order to ship all business to Godley & Griffin to Savannah, Ga., 50 cars could have been shipped, as to why they were not shipped, I do not know.

[fol. 326] Q. 44. During the month of September what was the market condition with respect to coal?

A. The market during the first part of September was pretty good, though I should say it got a little soft during the last half of the month compared to what it was in August.

Q. 45. Your statement Exhibit "A" shows that this coal shipped by Flanagan during September was re-sold by the Federal Coal Company to different customers at the price of \$9.00 and above, during that month. State whether or not your customers which accepted this coal during that month, were customers that had been contracted with during previous months or otherwise?

A. I could not say, don't remember.

Q. 46. In your previous deposition in this case you were asked to file as Exhibit "C" another statement. Have you prepared that Exhibit?

A. Yes, sir.

Q. 47. Will you please take that Exhibit and explain what it shows?

A. The first part of this statement shows coal which was bought by us from John D. Flanagan and invoiced to us by the Cumberland Mountain Coal Company. These cars were shipped over a period of August 17th to September 3rd, both inclusive, amounting to 1698 tons. The next section shows a list of five cars which were bought by us from John D. Flanagan and invoiced to us by the John D. Flanagan Coal Company. This was all during the month of May [fol. 327] 1920. The next shows a list of cars purchased by us from Mr. Flanagan and invoiced by John D. Flanagan. These are four cars both in May and July, 1920. The last shows one car which was bought by us from Mr. Flanagan and invoiced by the Cumberland Mountain Coal Company on July 7th, 1920.

Q. 48. Have you in your files, invoices representing the various purchases on this Exhibit "C"?

A. Yes, sir.

Q. 49. Please look to this and say what this is (Mr. Moore hands witness paper)?

A. That is a statement which we received from Mr. Flanagan covering car W. L. E. 72764, which was shipped on July 7th, 1920.

Q. 50. In what name was that car shipped?

A. Cumberland Coal Company.

Q. 51. And how was it billed and invoiced?

A. Same way.

Q. 52. To whom did you pay for that car?

A. Mr. Flanagan.

Q. 53. How were your payments made, cash, check or otherwise?

A. Check.

Q. 54. To whom were the checks made payable, the invoice under investigation?

A. I can't say, it was probably made payable to Cumberland Coal Company, I could produce the original check.

Q. 55. Will you please find and file original check and pin the check and this invoice together and make the two Exhibit No. 2 to this deposition?

A. I will.

Exhibit No. 2.

[fol. 328] Q. 56. The four cars next above on your statement, Exhibit "C" were shipped and billed by John D. Flanagan as you have explained. How were your payments made for those?

A. By check.

Q. 57. Will you file one of the checks representing payment on account of these shipments as illustrative of the person to whom payment was made?

A. I will.

Q. 58. Have you filed any of the invoices for those shipments?

A. No, sir.

Q. 59. Will you please take one of the invoices as illustrative of the form of the invoice and attach it to the check last inquired about and file it as Exhibit No. 3 to this your deposition?

A. I will.

Exhibit No. 3.

Q. 60. The group next above on your Exhibit is the coal that you have explained was shipped and billed in the name of John D. Flanagan Coal Company. Will you please take one of the invoices and one of your checks paying for coal in this group and file it, pinned together, as Exhibit No. 4 as illustrative of the payment and billing of this coal?

A. I will.

Q. 61. The larger group above, as you have explained, represents the coal shipped by the Cumberland Mountain Coal Company. Will you please file one of the invoices and a check given in payment

[fol. 329] therefor, as illustrative of the manner of invoicing and payment of that coal, and mark it Exhibit No. 4?

A. Yes, sir.

Exhibit No. 4.

Q. 62. All of those several names was the complainant, Flanagan?

A. Yes, sir.

Q. 63. In addition to these several names that Mr. Flanagan used, he was the chief Managing Officer of the Tracy City Coal Company?

A. Yes, sir.

Q. 64. How about the Campbell Branch Coal Company, did he have anything to do with that?

A. He was President.

Q. 65. Do you know whether it was a corporation or another trade name?

A. I am sure it was a corporation.

Q. 66. Did he have any more that he was the Chief Managing Officer of at that time?

A. I think that is all.

Q. 67. You have explained there was a special agreement for the abatement of price on the contract as to one order. Please refer to order form made Exhibit "B" to your previous deposition in behalf of complainant in this case, and say whether or not that is the order to which you refer?

A. Yes, sir, it is.

Q. 68. Was 1,500 tons of coal shipped under this order?

A. Yes, sir.

Q. 69. Was that coal shipped as a part of the coal stipulated for in the contract in suit?

A. Yes, sir.

Q. 70. Mr. Thompson, after this controversy arose, I will ask you [fol. 330] to say whether or not you made a trip to Tracy City to investigate the matter?

A. I did.

Q. 71. While you were there, I will ask you whether or not you made an examination of the privilege license record of the County Court Clerk of Grundy County to determine whether or not complainant, John D. Flanagan held license as a coal dealer?

A. I did.

Q. 72. I show you a certified copy of a privilege license and ask you whether or not this is the certified copy with the Clerk or Deputy Clerk of the County Court of Grundy County, representing the license held by Mr. Flanagan?

A. It is.

Q. 73. Will you please file this certified copy of the license as Exhibit No. 5 to this your deposition?

A. I will.

Exhibit No. 5.

Q. 74. I will ask you if you examined the records both before and after the dates shown on this license to determine whether there was any license previous or subsequent to the copy that you now file?

A. I examined the records very carefully and *and* that license is the only one issued to Mr. Flanagan or the Cumberland Coal Company.

Q. 75. I will ask you to say whether or not that record had been modified in any way to include the name "Mountain" in the license?

A. No, sir.

Q. 76. During the time that coal was being shipped under this contract from September first to December 31st, please state what [fol. 331] employe of the Federal Coal Company, if any one, had particular charge of the coal from the Tracy City territory, including shipments under this contract?

A. Mr. John Crosniak.

Q. 77. To what extent, if any, did you give that matter attention during that period?

A. Very litt-e; of course, I knew in a general way of what was going on but I depended on Mr. Crosniak to handle all matters in connection with it.

Q. 78. What was Mr. Crosniak's particular business as an employe of the Federal Coal Company during that period?

A. He is in the office with me, you might term him my assistant, handling matters in general in conjunction with me.

Q. 79. The contract in suit refers to a contract made about April 1st, 1920 between the Tracy City Coal Company and the Chattanooga Coal Company, and makes provisions with respect thereto. I will ask you to file as Exhibit No. 6 to this deposition a copy of this contract therein referred to?

A. I will and do here file it as Exhibit No. 6.

Exhibit No. 6.

Q. 80. Where is the original of this contract which you file as Exhibit No. 6?

A. The last I knew of it it was in the possession of W. S. Bates of the Chattanooga Coal Company, I presume he still has it.

Q. 81. The records of this Court show that the Federal Coal Company [fol. 332] have an action in damage against the Tracy City Coal Company and W. S. Bates for the breach of a contract. I will ask you to say whether or not your Exhibit 6 is a copy of your contract you are suing on in that case?

A. Yes, sir.

Q. 82. Mr. W. S. Bates also has a suit against the Federal Coal Company claiming certain commissions or profits by reason of his contract entered into with the Federal Coal Company on the 7th day of April 1920 by which he resold to the Federal Coal Company the coal stipulated for in this contract with Tracy City, has he not?

A. Yes, sir, he has.

Mr. Moore: Notice is given that the record of the two cases referred to, as far as relevant, will be offered in evidence by the respondent herein.

Q. 82. Please look to this and say what it is, Mr. Thompson?

A. It is an invoice of the Cumberland Coal Company to the Hibbler-Barnes Coal Company, Chattanooga, charging them with seven cars of coal which was shipped on July 30th, 1920.

Q. 83. How did that paper come into the possession of the Federal Coal Company?

A. We got it from Hibbler-Barnes by going out there and asking them for it.

Q. 84. Will you please file that paper as Exhibit No. 7 to this deposition?

[fol. 333] A. I will.

Exhibit No. 7.

Mr. Lynch: It is agreed that this is a correct invoice in so far as it is relevant.

Q. 85. Mr. Thompson, I will ask you whether or not, during the year 1920, the Tracy City Coal Company was engaged in the business of mining and buying and selling coal?

A. Of course, I can't say that they actually mined any at all; as a matter of common knowledge they were engaged in the business of operating mines. We had the contract with them and they actually shipped some few cars on that contract of course, to that extent, they were necessarily in business.

Q. 86. You are not advised to what extent they were engaged in the business?

A. No, I am not advised to what extent, but upon thinking over my previous answer, I know they were in business because they actually furnished us some coal.

Cross-examination.

By Judge J. J. Lynch:

Q. 1. Mr. Thompson, did you handle the Godley & Griffin matter?

A. I don't remember now. I don't think I did.

Q. 2. When did you finish your contract with Godley & Griffin?

A. My recollection is they held up shipments to us about the last days of September.

Q. 3. You shipped to them all they wanted in September?

[fol. 334] A. I don't know that we did; we had orders from them for probably 100 cars at that time.

Q. 4. Will you file as Exhibit "X, Y, Z," etc., to your cross-examination, all of the correspondence you had with Godley & Griffin about this matter?

A. Yes, sir.

Exhibits "X, Y, Z," etc.

Q. 5. Don't you know, as a matter of fact, that your recollection is at variance to facts, when you state that Flanagan could have shipped all through September under your instructions; and that as a matter of fact, three days after you gave him the instructions

to ship to Godley & Griffin you countermanded the instructions and ordered him to ship some where else?

A. I don't remember that at all. If it is a fact I imagine the records will show it.

Q. 6. Don't the records show that on September 23rd, you sent shipping instructions, or your office did, to ship to other parties?

A. I don't know whether they did *not* not.

Q. 7. For instance, I will show you Exhibits 3 and 4 to Flanagan's deposition. I will ask you whether or not in these Exhibits you didn't give shipping instructions on September 23rd and 24th, to ship to other parties?

A. Yes, but that does not mention Godley & Griffin.

Q. 8. Certainly not, but it giving instructions to ship to others than Godley & Griffin?

[fol. 335] A. Yes, sir.

Q. 9. Then isn't it true that up to September 20th you had only given shipping instructions for twenty-four cars?

A. I don't know. I don't know that I have any way to say exactly.

Q. 10. Do you remember of having given shipping instructions to Mr. Flanagan at any time, to ship any cars, to anybody, under this contract that was not promptly complied with?

A. Have no recollection about it at all but I think as a general proposition he shipped pretty well. I was just looking over this Godley & Griffin matter. I notice he shipped as late as September 25th.

Q. 11. Please examine Exhibit "C" filed by Mr. Flanagan, and say whether or not after your instructions by wire on September 20th, you shipped four cars to Godley & Griffin; two on the 20th and two on the 21st and then on the 21st a car was shipped to C. C. Company of Cedartown, Ga.?

A. Yes, sir.

Q. 12. What Company was that?

A. Cedartown Cotton Export Company.

Q. 13. And on the 23rd another car to the same Company?

A. Yes, sir.

Q. 14. And on the 24th a car to C. of D. Douglasville, Ga.?

A. City of Douglasville, yes, sir.

Q. 15. Then on the 24th three cars again to Godley & Griffin?

[fol. 336] A. Yes, sir, that is right.

Q. 16. And then on the 25th one car to Godley & Griffin?

A. Yes, sir.

Q. 17. You phoned to Mr. Flanagan to ship these last four cars, three on the 24th and one on the 25th.

A. He was shipping then on original instructions.

Q. 18. To refresh your memory, was he not phoned to ship these cars after order to ship to another party on the 21st?

A. I think no-, he was not phoned by me and I don't believe he was phoned by anybody else. He had an open order to ship to Godley & Griffin.

Q. 19. The order itself shows?

A. Yes.

Q. 20. You referred to no order except this telegram?

A. That was his order.

Q. 21. And you know of no other order save that?

A. No, sir.

Q. 22. Examine again this Exhibit and say whether or not up to the 20th there had been only 20 cars shipped during that month?

A. There had been 24 shipped, including the 18th of the month, possibly the 19th was Sunday.

Q. 23. That's right, 24; and during the balance of the month there were 12 cars shipped, were there not?

A. Yes, sir, that is correct.

Q. 24. In other words, a bigger percentage was shipped after that [fol. 337] than before, during that month?

A. About the same proportion.

Q. 25. Is that your calculation as an expert Accountant?

A. Offhand it is.

Q. 26. That the same percentage was shipped before that as after that?

A. Two-thirds of the month had gone by, take 36 cars, that would be about a third of a month; practically two-thirds of the month had passed, and twenty-four is two-thirds of 36.

Q. 27. That's right, my mistake. Now comparing your Exhibits with Mr. Flanagan's, I notice in your Exhibit "A" you have the coal shipped in October marked sold to Hibbler-Barnes Company, and Mr. Flanagan has it delivered, marked on his Exhibit "C," to Gulf States Steel Company at Alabama City, and Allendale Cotton Mills, Company, Allendale, S. C. How do you explain that?

A. The coal was sold by us to Hibbler-Barnes, therefore we charged it to them. It was actually shipped to the Gulf States Steel Company.

Q. 28. Hibbler-Barnes were Brokers?

A. Yes, sir, we sold it to them and they in turn sold it.

Q. 39. When you sell to a Broker you expect to deliver to his consignee, don't you?

A. We merely sold the Hibbler-Barnes Company so many cars of [fol. 338] coal and they told us to ship to the Gulf States Steel Company.

Q. 40. And you gave instructions accordingly?

A. We may have made a mistake, we show them on Hibbler-Barnes, but that is hardly material.

Q. 41. When you sell to a Broker you expect to deliver to his consignee?

A. It depends on how the case might be; Hibbler-Barnes might have taken it into the yards.

Q. 42. But as a rule when you sell to a Broker you expect to deliver to his consignee?

A. If he is solely a Broker and has no other facilities.

Q. 43. Now, you were speaking of average prices obtained by Mr. Flanagan in the month of September, October, November and December. You figured this from that Exhibit filed here?

A. Yes, sir.

Q. 44. Now you can't tell how much of this was delivered on contracts made prior to the drop in coal and how much was made on spot coal?

A. No, sir.

Q. 45. So you can't use that as a basis of the market value during those months?

A. They had all the ear-marks of being spot sales.

Q. 56. I notice on the first day of December one car was delivered to the Royal Coal Company at \$4.00 per ton; three cars delivered to the U. S. Fuel Corporation at \$3.50 per ton, and one car delivered to the Tennessee Consolidated Coal Company at \$5.25. Do you assume that the Tennessee Consolidated Coal Company was paying [fol. 339] \$5.25 on that date for spot coal when other people were getting it for \$3.50?

A. That would be hard to tell, the idea of market prices varied greatly, especially when things were as they were in 1920. You might get \$2.00 more from one man than you could from another.

Q. 57. Mr. Hampton of this Company is a very shrewd business man, is he not?

A. He is reputed to be.

Q. 58. Is he in the habit of paying two prices more for coal than the market value?

A. It may be he didn't do that; he might have needed the coal and could have made a profit.

Q. 59. Don't you know at that time the market was dead and it was hard to sell coal?

A. It was pretty hard.

Q. 60. You were speaking of the ear-marks; I turn to December 4th and I find a car of coal sold on that date to the Tennessee Consolidated Coal Company at \$5.25; another car sold on that date to Will Anderson for \$2.50; another to U. S. Fuel Corporation for \$2.50 per ton. Are these the ear-marks that you contend represented the market value, and that this \$5.25 coal was being sold on the market?

A. I didn't say that.

Q. 61. You said this bore the ear marks of being so sold?

A. I sold spot coal in December for more than that?

Q. 62. Don't you know instead of this being ear-marks, don't you know that it shows the contrary and that Mr. Hampton was not at [fol. 340] likely to pay \$5.25 on the condition of the market, plentiful as the coal was then?

A. Maybe he didn't; I don't know that Mr. Hampton did that.

Q. 63. Doesn't that bear the ear-marks of being coal that had been previously contracted for as a matter of common sense?

A. Not necessarily; it is possible that it was, if so I guess it can be proven.

Q. 64. Go on further down, don't you find all through the month the Tennessee Consolidated Coal Company was paying \$5.25 for this coal, regardless of the price other people were paying for the coal?

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A. Yes, I notice the Tennessee Consolidated Coal Company took 15 or 20 cars during that time.

Q. 65. Doesn't that indicate to you, as a matter of common sense, they were delivering it under contract?

A. Not necessarily under contract. They might have had a purchase made a short time back at so many cars.

Q. 66. Does that not show, as a matter of common sense, that would not indicate the market price at that time?

A. No, sir, it would not indicate the market price.

Q. 67. You don't intend that would indicate the market price at that time?

A. No, sir.

Q. 68. And yet you took that into consideration in averaging up the prices received by Mr. Flanagan for his coal during that month? [fol. 341] A. Yes, sir.

R-examination.

By C. C. Moore:

Q. 1. Mr. Thompson, I will ask you to say whether or not during the period beginning with the middle to the last of September, 1920 and extending to December 31st, 1920, the price of coal varied materially?

A. It did.

Q. 2. During that period, state whether or not there was a recognized market price for any grade of coal at any particular place?

A. I would not say that there was not, things were changing pretty fast.

Recross-examination.

By Judge J. J. Lynch:

Q. 1. You were asked about the November sheets. So far as they concern any shipment to you, your Company, do you find anything incorrect in these sheets or any other Exhibit filed by Mr. Flanagan?

A. It is not a matter that could be compared so far as our transactions were concerned; so far as my transactions are concerned we found that satisfactory; the other end of the transactions, we had no way of knowing.

Q. 2. So far as your transactions with the concern, his statement tallies with the affairs so far as you are able to ascertain?

A. Yes, sir.

[fol. 342] And further this deponent saith not.

Signature Waived.

Sworn to before me this the 29th day of March, 1922. —
—, Notary Public.

Next Witness, JOHN CHROSNIAK, being duly sworn, deposed as follows:

Direct examination.

By C. C. Moore:

Q. 1. Mr. Chrosniak, have you heretofore given a deposition in this case in behalf of the complainant?

A. I have.

Q. 2. In the Fall of 1920 you were in the employe of the Federal Coal Company, I believe you show in the former deposition?

A. I was.

Q. 3. What was your particular duties under that employment?

A. I was assistant to Mr. E. R. Thompson, who is Secretary & Treasurer of the Federal Company.

Q. 4. Your former deposition shows that you were in Cuba in the first part of the period of this contract, returning about October 10th or 12th?

A. Yes, sir.

Q. 5. I will ask you whether or not following your return from Cuba you gave attention to the business of the Federal Coal Company [fol. 343] either in the office or from the office?

A. In addition to my several duties with the Federal Coal Company, I handled the Tracy City business altogether.

Q. 6. With whom, in the Tracy City territory, did you handle that business?

A. Mr. Flanagan; Tennessee Consolidated Coal Company; Tracy City Warehouse Co., Flat Branch Co. and the Roberts boys.

Q. 7. During that period, state whether or not The Federal Coal Company was operating its mines and handling coal from their territory?

A. They were.

Q. 8. After your return from Cuba about October 10th or 12th state whether or not Mr. Thompson had anything to do with telephoning or dealing with people of the Tracy City section, including Mr. Flanagan?

A. No, sir, that business was turned over to me, I handled that exclusively.

Q. 9. Was there any rule or custom in the office with reference to answering telephone calls from the Tracy City section?

A. The office help had orders to put me on the line whenever the Tracy City section called the Federal Coal Company?

Q. 10. Were or not those orders carried out?

A. They were.

Q. 11. After your return, state whether or not Mr. Thompson carried on a telephone conversation with Mr. Flanagan?

A. Not to my knowledge.

Q. 12. How were long distance calls received and handled in the [fol. 344] office of the Federal Coal Company?

A. They were handled by Miss Casey, the stenographer, and a Miss Smith who was filing clerk and an assistant of Miss Casey.

Q. 13. Where is the Miss Casey, and Miss Smith to whom you refer?

A. Miss Smith, I believe is now employed in the office of Sam Whitaker.

Q. 14. And Miss Casey?

A. Miss Casey is at home, in the City of Chattanooga.

Q. 15. Are either of the young ladies now in the employe of the Federal Coal Co.?

A. No, sir.

Q. 16. Has Miss Casey gotten married since that time?

A. Yes, sir, her name is Mrs. Talley, I believe.

And further this deponent saith not.

Signature Waived.

Sworn to before me this the 29th of March, 1922. —
—, Notary Public.

Next Witness, Miss WINFRED SMITH, after being duly sworn, deposed as follows:

Direct examination.

By C. C. Moore:

Q. 1. Miss Smith, state whether or not in 1920 about August of the year, of that year, you were employed in the office of the Federal Coal Company?

A. I was employed by the Federal Coal Company from the 20th of October.

[fol. 345] Q. 2. From the 20th of October to the remainder of the year were you in the office of the Federal Coal Company?

A. Yes, sir.

Q. 3. Generally speaking, what were your duties?

A. I had charge of the filing and telephone, I answered all the calls.

Q. 4. You among other things answered the telephone calls?

A. That was my chief duty at the time.

Q. 5. State whether or not there was a rule at that time in the office that was observed, that long distance calls from the Tracy City section in reference to coal was referred to any particular man in the office?

A. I didn't understand it was exactly a rule, but I learned in a little bit that Mr. Thompson gave the handling of that business to Mr. Chrosniak.

Q. 6. And who talked over the phone about those matters?

A. Mr. Chrosniak.

Cross-examination.

By Judge J. J. Lynch:

Q. 1. Mr. Flanagan called frequently during that Fall, didn't he, from Tracy City?

A. Yes.

Q. 2. Do you know how often he called during each week during that Fall?

A. No, I don't know how often, I know he called quite frequently for awhile.

Q. 3. I will ask you if that didn't continue on up to Christmas? [fol. 346] A. I don't know just what time it was, whether it was before Christmas or in 1921.

Q. 4. You don't know whether it stopped before Christmas or continued until 1921?

A. No, I just know for awhile we had a great many calls from Mr. Flanagan?

Q. 5. You know it continued through the Fall?

A. I think so.

Q. 6. Didn't Mr. Flanagan sometimes call for Mr. Thompson?

A. Yes, he asked for him, but Mr. Thompson would not talk to him.

Q. 7. And they would send Mr. Chrosniak?

A. Yes.

Q. 8. Would sometime Mr. Chrosniak be out of the office or out of town and Mr. Thompson answer Mr. Flanagan?

A. I don't remember, he might have.

Q. 9. That might have occurred?

A. It might have, I don't remember.

And further this deponent saith not.

Signature Waived.

Sworn to before me this the 29th day of March, 1922. —

—, Notary Public.

Next Witness, Mrs. BUTHR TALLEY (formerly Miss Casey) being duly sworn, deposed as follows:

[fol. 347] Direct examination.

By C. C. Moore:

Q. 1. I will ask you whether or not in the Fall of 1920 from August until December you were employed in the office of the Federal Coal Company?

A. Yes, sir.

Q. 2. What were your duties during that time?

A. Stenographer.

Q. 3. Did you receive any of the telephone calls?

A. Yes, sir.

Q. 4. Can you say what employee in the office talked over the telephone to the Tracy City section about coal during that time?

A. Mr. Chrosniak did all the talking.

Cross-examination.

By Judge J. J. Lynch:

Q. 1. You wouldn't undertake to say that sometimes when Mr. Chrosniak was out of the office or out of town, Mr. Thompson would not talk?

A. He would not talk, he would say wait till Chrosniak got back, but I don't remember him being out.

Q. 2. They were trying to avoid taking that coal, were they not?

A. All I remember, I had instructions, if any Tracy City operator called, I was to refer it to Mr. Chrosniak.

Q. 3. And when they would call for Mr. Thompson he would decline to go to the phone?

A. Yes.

[fol. 348] Q. 4. At least you know he did decline to go to the phone?

A. I know he didn't talk.

Q. 5. How often did Mr. Thompson call him?

A. I don't remember. I know he called often.

Q. 6. All through the Fall?

A. Yes.

Q. 7. Could you ever hear the conversation?

A. No, I was in the other room.

Q. 8. You remember that this continued after they tried to avoid taking coal, after the price went down?

A. I don't remember anything about the details.

Q. 9. I will ask you if frequently when Mr. Flanagan called and tried to get somebody that nobody would answer at all?

A. Someone always answered.

Q. 10. When Mr. Chrosniak was out of town, Mr. Thompson still declined to go to the phone, did he not?

A. I don't remember, I remember he flatly refused to answer.

Q. 11. You know he would not answer those Tracy City calls?

A. Yes.

Q. 12. Just how often Mr. Flanagan called each week you don't know?

A. No.

Q. 13. You do know it was frequent?

A. Yes.

Q. 14. And continued all through the Fall?

A. Yes.

Q. 15. Do you remember on one occasion when both Mr. Chros-
[348½] niak and Mr. Thompson were gone Mr. Flanagan talked to you about it, and wanted you to see if you could not help him out?

A. Seems like I did, but I don't remember what I told him.

Q. 16. You remember he was begging you to get some orders on that coal?

A. Yes, sir.

Q. 17. Did you communicate that to Mr. Thompson or Mr. Chrosniak?

A. I have forgotten.

Q. 18. Presumably you did?

A. Yes, sir.

And further this deponent saith not.

Signature waived.

Sworn to before me this the 29th day of March 1922. —
—, Notary Public.

E. R. THOMPSON, being re-called for further cross-examination, deposed as follows:

Cross-examination.

By Judge J. J. Lynch:

Q. 1. Did the Federal Coal Company pay a dealer's tax for the State or County for the year 1920 or any part of it?

A. Yes, I paid it for the year 1920, but it was paid subsequent to the year 1920.

[fol. 349] Re-examination.

By C. C. Moore:

Q. 1. To whom did you pay this tax, covering a privilege of doing business as a coal dealer for the year 1920?

A. Chas. E. Watson, County Court Clerk.

Q. 2. Mr. Watson is the County Court Clerk of Hamilton County, Tenn.?

A. Yes, sir.

Q. 3. Did the Federal Coal Company have its office at Chattanooga, Hamilton County, Tennessee, during 1920?

A. Yes, sir, one of them.

Q. 4. Where was its other offices?

A. Pineville, Ky. and Wilmington, Del.

Q. 5. Your corporation is a Delaware corporation?

A. Yes.

Q. 6. The Wilmington office is the home office of the Company, I judge?

A. Yes, sir.

Q. 7. What was the business principally done at the Pineville office?

A. The operation of mines or matters incident to the care for the Company's property and the production of coal from the mines.

Q. 8. During 1920 did the Company also have a representative at Pineville that bought coal for it?

A. Yes, sir.

Q. 9. About how long has the Federal Coal Company been engaged in business?

A. We were organized the latter part of 1917, actually started business April 1918.

[fol. 350] Q. 10. What was the business that was first done by the Federal Coal Company?

A. Operation of coal mines and selling of coal.

Q. 11. What is the primary or chief business of the Federal Coal Company?

A. The operation of its own coal mines and selling of coal produced at its mines.

Q. 12. Does it regularly, and all the time, engage in the buying and selling of coal in addition?

A. No, sir, not all the time.

Q. 13. When the market conditions are unfavorable or the market demand is dull, state whether or not the Federal Coal Company from its own mines can supply its customers?

A. We can, as a matter of fact, when the market is dull we have to concentrate our efforts entirely on selling our own coal, and as a matter of fact, it is not always possible to do that. During 1921 for instance, and this part of 1922, it has not been possible to sell anything like the coal we produce at our own mines.

Q. 14. When the market is unusually active like it was in 1920 from June to October, state whether or not the customers of the Federal Coal Company require a larger amount of coal than you can produce at your own mines?

A. Yes, sir, that is true.

Q. 15. Has that condition prevailed more than once during the history of the Federal Coal Company?

A. For a short period in 1919 it was necessary for us to buy coal outside and ship to our customers and during a large part of 1920; [fol. 351] it didn't prior to that time, and hasn't since.

Q. 16. During the year 1921 up to the present, 1922, your mines have been able to supply your customers?

A. We have not been able to sell all our own mines can produce.

Re-recross-examination.

By Judge J. J. Lynch:

Q. 1. When did Mr. Watson, the County Court Clerk, make you pay this dealer's tax for the year 1920?

A. Some time during the year 1921, I don't know exactly.

Q. 2. You paid it rather than have any controversy about it?

A. He merely said we would have to pay it; since he knew we had done some business and had not paid our privilege tax it was

his duty to make us pay it, if we didn't do it, it would be his duty to take steps to issue a warrant or something; he intimated he would have to do that if we didn't pay it.

Q. 3. You did a very large volume of Brokerage business in 1920, didn't you?

A. That depends on what you would term large; to some people it would be small and others it would be considered fairly large.

Q. 4. For this community?

A. Not as large as Mr. Cory, still we had a very large organization selling coal over Southeastern part of the United States.

Q. 5. Didn't you sell a great deal of different kinds and grades than that produced at your mines?

A. Yes, sir.

Q. 6. And made contracts for coal of different kinds and grades than that you produced at your mines?

A. Yes, sir; it was not a case of kind or grade at that time, it was just coal.

Q. 7. But your contract described the kind of coal you sold?

A. Not always.

Q. 8. Generally.

A. No, I would not say that, very often it did, but most cases it was a case of a man wiring us "can you ship us 10 cars of coal;" we would probably wire him back we could take his order for 10 cars at such and such price, nothing being said as to quantity, kind or from where it was coming.

Mr. THOMPSON was again re-called for further cross-examination, after the cross-examination of John D. Flanagan:

Cross-examination.

By Judge J. J. Lynch:

Q. 1. Mr. Thompson, in your re-examination a few minutes ago you were asked by your Counsel about the fact that your Brokerage business was only at times when you could not supply your trade from your own mines in Kentucky, now, as a matter of fact, your [fol. 353] Brokerage business was conducted on an entirely different basis of division of profits than with reference to the division of the profits arising from the selling of coal from your mines, was it not?

A. Not necessarily.

Q. 2. Necessarily or otherwise, isn't it true, that the books of your Brokerage business was kept entirely separate from the books with reference to your mining and sales of coal from your mines?

A. No, sir.

Q. 3. Wasn't an arrangement made by which you and other officers of your Company received a large share of the profits made in

the handling of the Brokerage business which you didn't get out of the profits made in the sale of the coal from the mines?

A. That is a matter which I decline to answer.

Q. 4. Didn't you personally get a very large share of the profits out of all the money made out of the Brokerage business?

A. I decline to answer that question also.

Q. 5. Will you file a copy of your books as Exhibit 25 to your cross-examination, showing exactly the persons to whom you sold coal as Brokers, during the year 1920, the price you paid for the coal you sold, the price you received for the coal you sold, and the manner in which these profits were divided between you and other officers and stockholders of the Federal Coal Company?

A. No, sir, I certainly will not.

Q. 6. You decline to file these records.

[Vol. 354] A. Yes, sir, there are reasons in all things.

Mr. Lynch: I think so too, but it has been exceeded in this case. And further this deponent saith not.

Signature waived.

Sworn to before me this the -- day of March 1922. —
—, Notary Public.

[fol. 355] DEPOSITION OF J. C. BEASLEY—Filed April 24, 1922

Deposition of J. C. Beasley, taken by consent in Murfreesboro, Tennessee, on April 13th, 1922, to be read as evidence in the trial in each of the above-styled causes subject to exceptions for incompetency, all formalities in the taking, transcribing and transmitting the deposition being waived and the witness being first sworn, his signature to the deposition is waived and the stenographer taking this deposition is authorized to sign the names of the counsels to this stipulation.

Said witness, J. C. BEASLEY, being duly sworn, deposed as follows:

Direct examination.

By J. J. Lynch:

Q. Mr. Beasley, do you live in Murfreesboro?

A. Yes, sir.

Q. You have lived here for several years?

A. Yes, sir.

Q. You are of lawful age, are you not?

A. Yes, sir.

Q. I am asking you if you were at one time President of the Tracy City Coal Company?

A. Yes.

Q. I will ask you whether or not you are the J. C. Beasley whose name is endorsed on the contract between John D. Flanagan and the Federal Coal Company sued on in this cause, dated August 19, 1920?

A. I don't remember the date, but I am endorser on a contract of about that date and I suppose that is the one.

Q. I will ask you to examine this contract, filed as Exhibit "C" to the cross examination of John D. Flanagan, being the contract [fol. 356] between the Tracy City Coal Company and John D. Flanagan executed on the 3rd day of September, 1919, and will ask you if you remember that contract?

A. Yes. I haven't had time to read the contract thru but this is my signature, signed as President of the Tracy City Coal Company.

Q. I will ask you whether or not that contract was renewed from time to time so as to cover the year 1920?

A. Yes.

Q. I will ask you, Mr. Beasley, if there was any other contract between the Tracy City Coal Company and Mr. Flanagan, or the Campbell Branch Coal Company owned by him, or any private understanding between you except the contract I have just handed you and filed as Exhibit "C"?

A. No.

Q. Do you remember a contract between the Tracy City Coal Company and the Chattanooga Coal Company, a copy of which is here shown you, which was filed as Exhibit "A" to the Bill of W. S. Bates against the Federal Coal Company?

A. Yes.

Q. I will ask you if there was any agreement or understanding between the Tracy City Coal Company and Mr. Flanagan as to the terms and provisions contained in the contract between the Tracy City Coal Company and J. D. Flanagan filed as Exhibit "O" to the cross examination of Mr. Flanagan which has been shown you?

A. No.

Q. Then as I understand you, the question as to whose duty it was to fill that contract is a question of law, depending upon the construction of that contract?

A. Yes, I guess so.

Q. I will ask you if you remember having heard of the so called assignment of this contract with the Tracy City Coal Company to the Federal Coal Company?

A. Yes.

[fol. 357] Q. I will ask you when you heard of this assignment if you took the matter up with Mr. C. H. Garner, Attorney for the Tracy City Coal Company?

A. Well, yes, we took it up with him, but I don't know just how soon after it was heard of that we did it.

Q. I will ask you whether or not Mr. Garner advised you that the contract was not assignable?

A. Yes.

Q. I will ask you if you ever recognized, so far as you are concerned, any rights of the Federal Coal Company under this contract?

A. You mean I, as President of the Company?

Q. Yes.

A. Well, I don't believe after it was brought to my attention, there was any more coal shipped to them.

Q. I will ask you whether or not you were governed by your attorney's advice in this matter?

A. Yes. The shipment of coal had already been stopped, but there was no more after that was given.

Q. I will ask you if you had any official notice of the assignment of this contract on the part of the Federal Coal Company?

A. I don't know.

Q. Do you remember the occasion of a meeting at Tracy City, with Mr. Chrosniak of the Federal Coal Company and Mr. J. W. Thompson, Attorney for the Company, at which meeting Mr. Bates was also present, this being the early part of July 1921, when an agreement was negotiated but not consummated, looking to the abrogation of the Chattanooga Coal Company and the making of the commission contract?

A. Yes, I was there.

Q. I will ask you if on this occasion or any other occasion, you misrepresented or mis-stated any fact to Mr. Chrosniak or anyone [fol. 358] else with reference to the financial condition of the Tracy City Coal Company or any other fact?

A. I did not.

Q. I will ask you if you concealed from Mr. Thompson or Mr. Chrosniak or Mr. Bates or anyone else any fact connected with this matter that you know of?

A. I didn't knowingly conceal anything.

Q. It is charged that you misrepresented the financial condition of the Tracy City Coal Company. I will ask you whether or not you stated to Mr. Chrosniak that by reason of failure to carry out this contract and that a judgment of this size that he suggested, would wipe the Company off the map and that it only had a paid in capital stock of forty thousand dollars, is that statement correct?

A. Absolutely.

Q. It is also charged that you concealed from the agents and officials of the Federal Coal Company the facts with reference to the contract between Mr. Flanagan and the Tracy City Coal Company filed as Exhibit "O"? I ask you to examine a copy of the tentative agreement that was prepared on that day filed as Exhibit "1" to the cross examination of Mr. Chrosniak in which it has this clause:

"Whereas by virtue of certain contract heretofore entered into, the Campbell Branch Coal Company and J. D. Flanagan of Tracy City, Tennessee, have an interest in the performance of the contract entered into by the Chattanooga Coal Company and any claims which may be presented on account of the alleged breach thereof,"

Do you know who disclosed this fact on that day, or do you remember?

A. No, I don't, Judge.

Q. I ask you whether that fact — concealed, if it was a fact?

[fol. 359] A. There was no attempt on my part to conceal anything.

Q. You were in conference with Mr. Flanagan during this negotiation?

A. Yes.

Q. I will ask you if there was any conversation or understanding between you and Mr. Flanagan about this cancellation of the Tracy City and the Chattanooga Coal Companies by fraud, misrepresentation or concealment?

A. No, indeed.

The Federal Coal Company here and now disclaims having made any charge of any kind against this witness, J. C. Beasley, and denies that there is anything in this record as a premise for the question asked stating that there had been charged that this witness has participated in a fraud in any respect, if there is any testimony offered that might be construed as a charge against Mr. Beasley, it is withdrawn, but I do not construe the testimony to convey any such charge and do not understand that there is a conflict between the testimony as to what Mr. Beasley told him and what Mr. Beasley now says he told him.

Cross-examination.

By Mr. Moore:

Q. Mr. Beasley, in actual practice under this lease contract, where Mr. Flanagan had leased the mine of the Tracy City Coal Company, who had charge of selling the coal produced at the mine?

A. Mr. Flanagan.

Q. Who had charge of the matter of making contracts for the sale of coal?

A. It was his coal and he sold it to whom he pleased. I assisted him in any way I could, however.

[fol. 360] Q. When you undertook to assist Mr. Flanagan in making a sale, did you do it at his request?

A. I don't know whether I did or not. If I felt that I could be of any service to him, I would always do so.

Q. Did you take any part yourself in negotiating this contract between the Tracy City Coal Company and the Chattanooga Coal Company?

A. We conferred over the telephone about the matter.

A. What is your recollection of the substance and effect of your telephone conversation about this contract?

A. I don't remember. Mr. Flanagan asked me, I believe, the time, about, of the solvency of the Company, and such matters were discussed, and in the course of the conversation it was suggested

that Mr. C. M. Preston would sign as surety on the contract, and I at once advised Mr. Flanagan that Mr. Preston was perfectly good.

Q. And Mr. C. M. Preston did endorse the contract?

A. Yes.

Q. And Mr. Flanagan was taking your opinion and judgment as to the surety for Bates in his performance of the contract?

A. I don't know. He was asking if it was any good.

A. And that was the primary purpose of his conversation with you about?

A. I don't know that it was his primary purpose, but that came out in the conversation.

Q. Was, at that time, the Tracy City Coal Company producing any coal?

A. No, they were not.

Q. And not buying and selling any?

A. No.

Q. Who was to furnish the coal to fill the contract?

(Question objected to.)

A. It was to be furnished by the lessee.

Q. Do you know how this contract happened to be in the name [fol. 361] of the Tracy City Coal Company instead of Mr. Flanagan?

A. No, sir.

Q. Was there any reason given to you at the time for using the name of the Tracy City Coal Company in the making of this contract?

A. No, sir.

Q. Did you actually know that it was going to be used until after the contract?

A. No, sir.

Q. Do you know how long it was that this contract had been executed in the name of the Tracy City Coal Company?

A. No, I don't remember.

Q. Did you undertake to direct Mr. Flanagan in the shipping of the coal he mined on this contract or any other contract?

A. No, sir.

Q. The matter of selling his coal and shipping his coal was entirely up to him?

A. Yes. If I could be of any assistance to him, I would be glad to do what I could to help bring about an advantageous sale, however.

Q. Did the Tracy City Coal Company have any direct interest in the coal that was to be delivered on this contract?

Objected to because that is a question of law under the proper construction of the contract.

A. No.

Q. Did the Tracy City Coal Company pay T. O. Busbee any commission for his part in negotiating this sale?

A. I don't think so.

Q. If any was paid, it was paid by someone else, is that so?
[fol. 362] A. So far as I can remember.

Q. The checks of the Tracy City Coal Company were countersigned by you were they not?

A. Yes.

Q. Do you recall whether you signed that Busbee check?

A. I may be mistaken. Mr. Flanagan has the checks but I do not recall that I did. When I sold my stock to him all the checks, stubs and books were turned over to him.

Q. Do you recall when settlement would be made under this contract for coal delivered that the checks for the coal shipped by Tracy City Coal Company would be sent to you or whether Mr. Flanagan would handle them?

A. I don't remember, the books will show that.

Q. The books of the Tracy City Coal Company would also show whether any of this commission was paid by the Tracy City Coal Company or whether it is correctly drawn and the amount reimbursed to it by Mr. Flanagan?

A. The books, checks and stubs.

Q. The checks wouldn't show how he reimbursed the amount?

A. No, but we have not been reimbursed.

Q. Was any other contract ever made for the sale of coal in the name of the Tracy City Coal Company so far as you know except this Bates contract and the Railroad contract?

A. There were none, so far as I remember.

Q. Didn't the Tracy City Coal Company have any other interest in the coal to be delivered under this contract than its pro rata percentage of royalty as stipulated under the lease?

A. That was all the financial interest they had.

Q. You were asked about the meeting in Tracy City in July 1920, when Mr. Thompson, Mr. Chrosniak and Mr. Bates were present and the matter of this contract was under consideration. Do you remember [fol. 363] at whose instance you attended that meeting?

A. I think Mr. Thompson telegraphed me and telephoned me too to go up there.

Q. Why did Mr. Thompson want you there?

A. I can't say.

Q. That is the Mr. Thompson of the Federal Coal Company, and you did go?

A. Yes.

Q. When you got there, what was it that was the occasion of the meeting?

A. As I recall now, it was on account of the stoppage of shipments of coal. The shipping had stopped, and that was the cause of the conference.

Q. You say that at one time your attorney gave you certain advice as to the advisability of the contract, but that was after shipment had already stopped?

A. Yes.

Q. Do you remember about when that advice was given?

A. It might have been given Mr. Flanagan sooner but it was given

to me on my first visit to Tracy City after the shipments stopped. I don't know just what time it was given to Mr. Flanagan or me.

Q. Do you recall in what way you learned that the Federal Coal Company became interested in this contract for the delivery of this coal?

A. No, I don't unless it was thru Mr. Flanagan I think he told me.

Q. Was it explained to you why C. M. Preston was willing to guarantee the contract at the time he was offered as surety?

A. I think it was that he was a stockholder in the Coal Company, making contract with Tracy City Coal Company, and for that reason was willing to guarantee the contract, he was interested in the purchase of this coal and for that reason he was willing to endorse, as I understood Mr. Flanagan in telephone conversation.

Q. Who gave you that information?

A. It came from Mr. Flanagan.

Q. That took place in the telephone conversation you referred to?

A. Yes.

Q. You were asked on direct examination about the statement of Chrosniak to sue for a large sum and a response made thereto. Was that in the presence of Mr. Flanagan or do you recall?

A. I can't be sure about that.

Q. Where was the conference had in Tracy City?

A. We talked in Mr. Flanagan's office quite a while and I think I talked to some of these gentleman on the street at different times. I am not sure. We discussed it at length in Mr. Flanagan's office. I think the first conference was held in Mr. Flanagan's office and later down on the street near the bank.

Q. You don't recall at what place that anything was said?

A. I do not.

J. J. Lynch, Attorney for Tracy City Coal Company, and
Chas. C. Moore, Attorney for Federal Coal Company. Wm.
S. Rucker, Stenographer.

Corrected: J. C. Beasley.

[fol. 365] JOHN D. FLANAGAN being recalled for further cross-examination on April 1st, 1922, deposed as follows:

Cross-examination.

By C. C. Moore:

Q. 1. Mr. Flanagan, when you were last cross-examined, you had not at that time prepared and filed the several Exhibits that had been previously asked for, but since that time you have filed them?

A. Yes, sir.

Q. 2. Your largest Exhibit No. "L" shows the purchase and sale of coal through a period of months from June to December. Is this Exhibit made up of original records or just copies?

A. Original records.

Q. 3. The month of November appears to be different in form from other months. How does that happen, is that original or a copy?

A. That was not an original; at the time it was made, it was originally made on the original records as the others. At that time I decided to change this original system and had this amount of it copied, and then abandoned the idea and didn't complete it.

Q. 4. Where is your original record for November 1920.

A. I am certain it was destroyed at that time.

Q. 5. When was this copy made, that you filed?

A. It was made right on the first days of December.

Q. 6. Why did you make this copy and destroy the original?

[fol. 366] A. I expected to change my full system.

Q. 7. In what respect does this differ from the original that you destroyed?

A. The only difference is the difference you find there by comparing one to the other.

Q. 8. In other words, the original that you destroyed was similar to the records for the previous months?

A. Yes, sir.

Q. 9. That original then showed the persons from whom you bought the coal, the dates of the purchases and the amount paid for it?

A. Yes, sir.

Q. 10. In that respect, this copy for November differs; it does not show this information?

A. Yes, sir. That change was made long before we had ever anticipated a suit of this kind.

Q. 11. And that change was made because you determined to change your form of your records?

A. Yes, sir.

Q. 12. Why did you decide to change the form of your records, what was the purpose?

A. As a matter of fact this was more of a side line with me, is the reason why the records are not absolutely complete, and I decided to change the full form from the Brokerage sheet to this other form, I started there.

Q. 13. But my question was, why did you decide to change the form?

A. I didn't like the other form. I liked the form I was changing to better.

Q. 14. What was your objection to the first form?

[fol. 367] A. As a matter of fact it was some one else's form, and I didn't care for it. I thought I would go to a form of my own.

Q. 15. Now, did you copy the records personally or did you have a bookkeeper or employe?

A. Most of those records, quite a bit of it, I did myself; as I said, it was a side line.

Q. 16. And you say that this idea of changing your form took place sometime in December after the end of the month of November?

A. Yes, sir. I just employed a girl to do copy work; she copied it off of the other record.

Q. 17. Have you any idea what time in December it was that you determined to make this change?

A. It was early in December, at that time I expected to have it all copied and have the other record altogether; as a matter of fact that record for November is sheets from a bound book, and after this information was asked for here I just clipped those out of the book and filed them there making the complete record.

Q. 18. How about the December part of this Exhibit, is this original or is this a copy?

A. I am sure it is original.

Q. 19. Then how does it happen that after having determined in the first part of December to change your system and leave off, as this Exhibit for November does, the information as to the parties from whom the coal was purchased, that your remaining Exhibit for the [fol. 368] month of December does show the *the* date as well as the name of the person from whom your coal was purchased?

A. As I just said, I had this November record copied in the first part of December and expected to change the full system, but after that was done, I decided then not to do it, and so I went on with the original system.

Q. 20. Did you have any other book that showed the names of the persons from whom this coal was bought and the price you paid for the coal to them?

A. No, sir, I don't think so.

Q. 21. How would you make settlement then with the people you were buying coal from?

A. At that time the coal had to be bought on a cash basis, settlement was made at the time the purchase was made.

Q. 22. Why did it have to be bought on a cash basis at that time?

A. That was a time when coal was at its peak, in December I don't guess it was, but as a matter of fact this coal handled was transferred from my other Companies or from my other lines, which there were accurate accounts kept of on those books.

Q. 23. All this coal, you say, had to be bought on a cash basis during December?

A. I would not say during December, as I said, it was bought and transferred from my other lines for which there was full settlement.

[fol. 369] Q. 24. Then was the reason that this information was not necessary, was because of the fact that you had other books for your other lines that did show it?

A. Yes, sir.

Q. 25. That is the reason?

A. Yes, sir.

Q. 26. Now, this record shows for December some of this coal was bought from Dr. Hembree, you didn't keep a set of books for Dr. Hembree, did you?

A. No, sir.

Q. 27. Then as to Dr. Hembree, that explanation would not hold good, would it?

A. No, sir.

Q. 28. The record also shows that in December you bought coal from the Dixie Coal Company; you didn't keep the books for the Dixie Coal Company, did you?

A. No, sir.

Q. 29. What about C. R. Stevens, did you keep the books for him?

A. No.

Q. 30. W. P. Stone?

A. All that coal is a small amount, which is a small percentage of coal through that month, that I handled from other parties; in my own mines the record is very complete; as a matter of fact the coal from those fellows was handled on a cash basis even through the month of December.

Q. 31. The Staub Coal Company, you didn't keep books for either, did you?

A. No, sir.

[fol. 370] Q. 32. You don't mean that the record here is complete as to these other people, as to the price paid any of them,—the several concerns I have named?

A. I don't know, sir.

Q. 33. I am looking at it and fail to see the price.

A. If it is not there, it is not.

Q. 34. Some of the coal in December appears to have been bought from the Campbell Branch Coal Company; that, I believe, you say, was simply a chartered name for yourself?

A. Yes, sir.

Q. 35. Mr. Flanagan, on your previous cross-examination when asked with respect to these shipping records that were then not in the file, you mentioned having kept in your office shipping records for more than one concern. Do you remember now the number of different concerns that you kept shipping records for, similar to the one you filed here?

A. I don't think that the question previously asked was shipping records similar to the ones filed here, was it?

Q. 36. They were mentioned "shipping ledger" in that question; there are many different kinds of shipping ledgers?

A. I think this was all of this particular kind.

Q. 37. Did you have any kind of shipping ledger for the Campbell Branch Coal Company?

A. Yes.

Q. 38. What kind is it?

A. A large bound book.

Q. 39. Did the Campbell Branch Coal Company sell coal to any [fol. 371] one else except this which is listed here as being shipped by you?

A. Yes, sir.

Q. 40. The Campbell Branch Coal Company actually operated mines as well?

A. Yes, sir.

Q. 41. Did it buy coal too?

A. No, sir.

Q. 42. It was exclusively a mining concern?

A. Yes.

Q. 43. And sold coal it mined itself?

A. Yes.

Q. 44. You have referred also in that same connection to the Tracy City Coal Company; did it operate mines during that period?

A. No, sir.

Q. 45. Did it ever operate any mines?

A. Yes.

Q. 46. When did it cease operating?

A. Just prior to that.

Q. 47. Was it prior to the year 1920?

A. I think it was.

Q. 48. How long had the Tracy City Coal Company been an organization?

A. I think since 1917.

Q. 49. During 1920, I believe you have testified that Mr. J. C. Beasley of Murfreesboro was the President, and that you were the Vice-President and General Manager. How long had you and Mr. Beasley held these respective positions previous to that time?

A. Seems to me about a year, I am not positive.

Q. 50. Mr. Beasley was not connected with the Tracy City Coal [fol. 372] Company at its first organization, was he?

A. No, sir.

Q. 51. After Mr. Beasley became connected with the Tracy City Coal Company, did it operate mines itself?

A. No, sir.

Q. 52. It was exclusively a leasing Company, was it not, after that time?

A. Yes, sir.

Q. 53. At least one contract for the sale of coal was made in the name of the Tracy City Coal Company in April of 1920, was there not?

A. Yes.

Q. 54. Was there more than the one that was made to the Chattanooga Coal Company?

A. Not that I remember of.

Q. 56. Was there one made to the Nashville, Chattanooga & St. Louis Railway Company, sometime in 1920?

A. Yes, sir.

Q. 57. Why were these two contracts made in the name of the Tracy City Coal Company, take first, the Nashville, Chattanooga & St. Louis Railway contract?

A. That had always been made in the name of the Tracy City Coal Company.

Q. 58. But Tracy City Coal Company had ceased to operate mines at the time the contract was made?

A. Yes, sir.

Q. 59. That contract was made for your benefit, wasn't it, in the name of the Tracy City Coal Company?

[fol. 373] A. It was made for both of our benefits.

Q. 60. At the time it was made it was expected that you would supply the coal and fill the contract and not the Tracy City Coal Company?

A. Yes, when I supplied the coal and filled the contract they got their pay and the profit.

Q. 61. They got their royalties?

A. Yes, the royalty fluctuated as to price, it was as much to their advantage in making the contract as it was to mine.

Q. 62. And another contract made April 12th, 1920 with the Chattanooga Coal Company for 18,000 tons of coal was also made in the same way?

A. Yes, sir.

Q. 63. While made in the name of the Tracy City Coal Company, it was made for your benefit primarily?

A. Not necessarily, just as much for theirs as mine.

Q. 64. But as between you and the Tracy City Coal Company the duty and obligation of supplying and delivering the coal under its contract rested on you?

A. Yes.

Q. 65. That contract made with the Chattanooga Coal Company is the contract that the Chattanooga Coal Company assigned and transferred to the Federal Coal Company, is it not?

A. I have heard that they did.

Q. 66. You heard that very soon after the contract was made?

A. No, it was quite awhile.

[fol. 374] Q. 67. And that is the contract that is referred to and sought to be cancelled in the contract you are suing on?

A. Yes, sir.

Q. 68. I don't believe a copy of that contract has been put into the record.

A. As a matter of fact I personally didn't have anything to do with that contract; that was made by the Tracy City Coal Company by its President. He had made arrangement with me to deliver the coal under the contract, it didn't concern me personally, any shape, form or fashion.

Q. 69. The contract was negotiated by T. O. Busbee, acting agent, was it not?

A. Yes.

Q. 70. And the authority to negotiate that contract was confirmed in a letter to the Chattanooga Coal Company, written and signed by you as Vice-President and General Manager?

A. Probably so, by the instructions of Mr. Beasley, the President.

Q. 71. Now, I show you what purports to be a copy of an operative provision of that contract, or the full contract, together with one of the original duplicate copies of the assignment and transfer of that contract to the Federal Coal Company, both pinned together. I will ask you to look over this contract between the Tracy City Coal Com-

pany and the Chattanooga Coal Company and say whether or not that is a copy of the contract referred to?

[fol. 375] A. Insofar as the contract transferred from the Chattanooga Coal Company to the Federal Coal Company, I have never seen it before, and to say whether or not this is a copy of the other contract, I could not say, because I have not seen the other contract since 1920.

Mr. Lynch: Counsel for the complainant states that they are willing to concede that this is a correct copy unless we later find discrepancy by comparison of the contracts.

Q. 72. Under the concession that this is a correct copy unless discrepancy is found, and I will assist Counsel to compare it to that end, please file this copy of the original of the assignment or re-sale of this coal from the Chattanooga Coal Company to the Federal Coal Company, the two pinned together, as Exhibit No-. "M" and "N"?

A. I will.

Exhibits "M" & "N."

Q. 73. Mr. Flanagan, there was shipped under this contract, which you have filed as Exhibit "N," between the Tracy City Coal Company and the Chattanooga Coal Company approximately 785 tons of coal, was there not?

A. I don't remember.

Q. 74. Some amount, any way, ten or twelve or fifteen cars?

A. I just can't say.

Q. 75. Do you remember any was shipped under it?

A. Yes, sir, there was some shipped.

Q. 76. Who was the shipper of the coal that was shipped under [fol. 376] that contract, on the bill-of-lading, how does it show?

A. Tracy City Coal Company.

Q. 77. And to whom were the bills rendered?

A. Chattanooga Coal Company.

Q. 78. And in whose name were they rendered?

A. Tracy City Coal Company.

Q. 79. Who attended to the shipping and rendering of these bills?

A. I did, or my office.

Q. 80. How were payments for that coal received?

A. Received as the Tracy City Coal Company.

Q. 81. Checks payable to the Tracy City Coal Company?

A. Yes, which were sent to Mr. Beasley and he endorsed them and credited them to Tracy City Coal Company and then paid me for the coal.

Q. 82. How much would he pay you for the coal?

A. I think the ratio was 45¢ to \$2.90, on proportion whatever the coal was.

Q. 83. This coal as shown by this contract was sold by the Tracy City Coal Company at \$3.90 per ton, and you had, at that time, as I understand from your previous examination, a lease contract with the royalty provision for some sliding scale?

A. Yes, sir.

Q. 84. Now, were the full amount of those checks received from the Chattanooga Coal Company sent to Beesley and credited by him to the Tracy City Coal Company and then all but the royalty under that contract retained by you?

[fol. 377] A. Yes, sir.

Q. 85. That is, Beasley retained the royalty for the Tracy City Coal Company?

A. Yes, I suppose that would be construed as royalty, it was a percentage from all the purchase part of the coal as 45¢ is to \$2.90, worked on proportion, up or down.

Q. 86. Was this lease contract that provided for this royalty in writing?

A. Yes.

Q. 87. Has a copy of it been filed already?

A. No, sir.

Q. 88. Will you file a copy of that contract so that its provision may be considered by the Court in that connection?

A. I herewith file the original as Exhibit "O."

Exhibit "O."

Mr. Lynch: Counsel for complainant states we will file the original with the privilege of having it copied and withdrawn, if we desire. The extension of this contract (a note of which is made in the handwriting of Mr. Warner), has not been found and so we can't file it.

The witness files as Exhibit "P" a copy of a letter written by him to the Tracy City Coal Company, exercising his option to extend the lease covering the year 1920.

Exhibit "P."

Mr. Beesley stated to Counsel last night he could not find the original.

Q. 89. The extension notice, dated December 17th, 1919, copy given by you to the Tracy City Coal Company, of which you are filing copy as Exhibit "P," extended your original lease during the year 1920 and was so recognized?

[fol. 378] A. Yes, sir.

Q. 90. Mr. Flanagan, was the provision of this lease with respect to the manner of handling and selling coal, modified as between you and the Tracy City Coal Company, at any time before this last extension?

A. I don't get just what you mean.

Q. 91. Just explain how you operated for the year 1920 and how the coal produced was handled and disposed of?

A. It was handled in different ways. The coal that was shipped on the Chattanooga Coal Company contract and the N. C. & St. L. contract was shipped under the name of the Tracy City Coal Company, and checks came payable to them, which Mr. Beesley handled and then paid me my pro rata part. Other coal I sold on the open market and to the Federal Coal Company, checks came payable to

me, which I endorsed and in turn paid to Mr. Beesley the Tracy City Coal Company's part, so it was operated both ways.

Q. 92. Why was not the other coal you sold, billed and shipped in the name of the Tracy City Coal Company the same as this?

A. Because it was not necessary to do that.

Q. 93. Was there any reason why it was necessary that the Chattanooga Coal Company, for instance, should be handled that way?

A. Only that the contract was made in the name of the Tracy City Coal Company.

Q. 94. The Railway Company contract was made that way because the Tracy City Coal Company having previously shipped and sold [fol. 379] coal to the Railroad could get the business somewhat better in its name than otherwise?

A. That might be true.

Q. 95. Any way, during all this time you were the actual operator of the mines, as provided under this lease?

A. Yes, sir.

Q. 96. Now, when the coal toward the last of April and in May begin to rise rapidly in price, the shipments and deliveries under this contract of April 12th, copy of which you have filed, slowed down, did they not?

A. Yes, sir, to some extent.

Q. 97. And the last shipment was made on the 25th of May?

A. Probably so.

Q. 98. Thereafter the Tracy City Coal Company, or you or no one else shipped any coal under that contract?

A. That may be true, I don't remember the date.

Q. 99. Why was that coal not shipped?

Mr. Lynch: Counsel for the complainant objects to the foregoing question because absolutely irrelevant to any issue in this case, and witness is instructed not to answer. I think you have gone far enough into his private affairs.

Q. 100. Under the instructions of your Counsel, I assume you will decline to answer, is that correct?

A. Yes, sir.

Q. 101. The Federal Coal Company and Mr. Bates, that is, the representative of the Federal Coal Company and Mr. Bates, who is [fol. 380] the Chattanooga Coal Company, made at least one trip to Tracy City to see if they could not endue the delivery of coal under this contract of April 12th did they not?

A. Yes, sir.

Mr. Lynch: Counsel for Complainant withdraw objection to previous question—we will go into the entire matter and I will examine defendants about their private affairs.

Q. 102. Since asking the last question, your Counsel has kindly consented to withdraw the injunction against the answer to the preceding question. With that injunction withdrawn will you please answer and say why the coal was not shipped and delivered under

this contract of April 12th entered into in the name of the Tracy City Coal Company with the Chattanooga Coal Company, as you were asked above?

Mr. Lynch: Witness is instructed that if he knows himself he may answer, but if the matter rested with Mr. Beesley or any other officer, he is not bound to give the reason or the action of the other officers as to why the coal was not delivered.

A. I will say I don't know.

Q. 103. Explain, please, by that, whether you mean that it was a matter resting with Mr. Beesley or other Officers of the Company?

[fol. 381] A. Yes. It was a matter resting with the Tracy City Coal Company, Mr. Beesley, as I have stated on several occasions, was handling the business of the Tracy City Coal Company.

Q. 104. You have, however, said in the first part of this cross-examination that the duty rested on you to ship and deliver the coal stipulated under this contract; how is it you don't know now why that duty was not performed?

A. I don't just get that.

Q. 105. Read the question?

A. I don't think that I made any such statement. I did state that I produced the coal but as to the fulfillment of the Tracy City Coal Company's contract was a matter that was absolutely up to Mr. Beesley.

Q. 106. Is that your construction of this lease, or is that because of some particular agreement between you and Mr. Beesley with respect to this particular contract?

A. Working under this contract, I did not have any authority, and neither did I exercise any, to fulfill any of the Tracy City Coal Company's contracts unless so ordered by the President who was actually in charge.

Q. 107. Where did the President stay during that time?

A. In Murfreesboro.

Q. 108. Where were the mines?

A. Tracy City, ten miles North of Tracy City.

Q. 109. Who had charge and control of the shipment of the coal from day to day as produced at the mines?

Q. 110. I did, and if the coal was shipped on the Tracy City Coal [fol. 382] Company's contract it was by orders of the President.

Q. 111. You knew this contract was in force for the shipment of 8 cars a week?

A. Yes.

Q. 112. And you made some shipments under it?

A. Yes, as directed by Mr. Beesley.

Q. 113. Did you get directions from day to day to ship under this contract?

A. Not necessarily, I don't just remember.

Q. 114. You were the man in charge?

A. Yes, I was in charge of the mines.

Q. 115. Did Mr. Beesley give you orders not to ship under this contract?

A. I don't remember about that.

Q. 116. Are you right certain that he did not?

A. I am not certain, no, sir.

Q. 117. Did he give you any orders at all either to ship or not to ship under any of these contracts?

A. We discussed these contracts pretty nearly daily about shipments.

Q. 118. But Mr. Beesley didn't undertake to direct where any coal should be shipped?

A. If he hadn't undertaken to direct the shipments of the Tracy City Coal Company, there would have been no one else to have done it; he was handling the Tracy City Coal Company exclusively.

Q. 119. As a matter of fact, he didn't undertake to direct it from day to day?

A. Not from day to day, but in a general way.

Q. 120. In what way explain what you mean?

A. As a matter of fact, if we shipped he consented to it; if we [fol. 383] didn't he didn't consent to it, that is all.

Q. 121. He consented to it after you had either shipped or had not shipped, is that what you mean?

A. No, as a matter of fact, he agreed, or said for me to ship on contracts for the Tracy City Coal Company or not to ship. Of course there was probably other reasons that would come in. As a matter of fact, along about that time, we had a considerable amount of rain that washed the railroad away; and the Railroad demanded more coal, and Mr. Latimer called up the Purchasing Agent of the N. C. & St. L. Ry. Co. and several times I was released of a great deal of tonnage on the contract. We called Mr. Bates when the N. C. & St. L. Inspector was there, and said to Mr. Bates, I have a certain amount of coal to go on your contract, the Railroad needs it bad, and Mr. Latimer took the telephone and Bates agreed to release it on the contract, and the Railroad took the coal.

Q. 122. How much coal of that nature did Mr. Bates agree to release?

A. Not any great amount but that happened several times.

Q. 123. Give us an estimate of the amount as you best remember it?

A. I could not do that, but I would not think probably over 10 or 12 or 15 cars, not over that.

Q. 124. About when would that occur?

A. That occurred before we ceased shipment altogether on contract.

[fol. 384] Q. 125. And who had the conversation with Mr. Bates?

A. Mr. Latimer.

Q. 126. You were present at your end listening to the conversation?

A. Yes.

Q. 127. Did you verify in any way that Mr. Bates had given such authority?

A. I talked to him.

Q. 128. You talked to Mr. Bates yourself?

A. Yes.

Q. 129. And he verified that?

A. Yes.

Q. 130. And you think that occurred on two or three different occasions and covered as much as 10 or 15 cars?

A. Yes; and shortage of cars and water and different things held us up.

Q. 131. Mr. Flanagan, this contract for 18,000 tons coming to the Federal Coal Company, and the Railroad contract were the only two large contracts the Tracy City Coal Company had?

A. Yes, and as a matter of fact, until long after shipments had absolutely ceased, did we ever know that the Federal Coal Company had anything to do with it.

Q. 132. Mr. Bates was the man that was dealing with you, trying to get the coal shipped?

A. Yes, I probably understood before shipments were absolutely stopped on it, that the Federal Coal Company was handling the coal, but I didn't know that the contract had been transferred to them.

[fol. 385] Q. 133. After shipments stopped, however, and the Chattanooga end began to get very insistent about it, you, were fully advised that the Federal Coal Company was interested?

A. The first time we had any positive advice was when they came up to see me, Bates and lawyer Thompson, and I think Mr. E. R. Thompson, Chrosniak, I knew, and I made a settlement with them, a verbal agreement, and then Bates, and the Federal Coal Company could not agree on their division of it, so then it stood for a couple of months that way, then we made this other agreement, I made this other agreement with the Federal Coal Company, trying to do the absolute right thing about it all the time.

Q. 134. When Mr. Bates and Joe Thompson, the attorney mentioned, and Mr. Chrosniak were there, after shipments had stopped, to see you about the fulfillment of the contract and the shipment of the coal, you say you reached an agreement with them at that time?

A. Yes, sir.

Q. 135. In substance what was that agreement?

Judge Lynch: If that was a written contract in question, I object to the question because the contract is the best evidence.

Q. It wasn't;—at that time I had an agreement that the Federal Coal Company was to handle my entire output on a commission of 60-cents a ton; in consideration of this they were to cancel this Tracy City contract. They agreed to it, then they and Mr. Bates [fol. 386] could not agree as to how they would divide the 60 cents, then it stood that way for six weeks or a couple of months, and then Mr. Chrosniak came up there and induced me to go into this other contract and cancel the Tracy City contract, which I did.

Q. 136. When you say they were to handle your output at 60 cents per ton, you mean the Tracy City Coal mines?

A. I meant my output.

Q. 137. That was the Tracy City mines you were operating?

A. And others, all the coal that I handled myself, Tracy City Coal and my own.

Q. 138. At that time, you were, in addition to operating this Tracy City mine, buying and selling coal from various other mines and little operations around that section?

A. Yes, contracting and operating.

Q. 139. Had other operations, large and small on your own account as well as buying and selling coal?

A. Yes, sir.

Q. 140. And that business you were doing in your own name, or John D. Flanagan, or Cumberland Coal Company or Cumberland Mountain Coal Company?

A. Yes, sir.

Q. 141. Was any coal bought in the name of the Tracy City Coal Company?

A. No, sir.

Q. 142. Now, when the matter of making the contract in suit came up and previous to that time did you tell the Federal Coal [fol. 387] Company, Mr. E. R. Thompson, or Mr. Chrosniak, or any agent for it, that you were obligated already to deliver the 18,000 tons of coal stipulated to be delivered under this Tracy City Coal Company contract?

A. No, sir.

Q. 143. You didn't tell them anything about the Tracy City Coal Company's contract so far as you were concerned, did you?

A. Not that I remember of, no, sir.

Q. 144. On the contrary, you always in conversation with them referred to that as a contract and obligation of the Tracy City Coal Company that didn't rest upon you primarily at all?

A. I think so.

Q. 145. Didn't you also in making discussions about the matter, shortly before the present contract was signed, say to them that a suit against the Tracy City Coal Company would do them little, or no good, because it would go into bankruptcy?

A. Absolutely, no, sir.

Q. 146. Didn't you say that, or that in substance to Mr. Chrosniak?

A. No, sir.

Q. 147. Didn't you say that, or that in substance to Mr. Thompson?

A. No, sir, absolutely not.

Q. 148. At the time you entered into this contract in suit to deliver the 200 carloads of coal, where did you have in mind to get the coal to fill that contract with?

[fol. 388] A. Well, I was producing more than enough to fill that contract.

Q. 149. How much were you producing at this Tracy City coal mine at that time?

A. Probably 300 tons a day, maybe more.

Q. 150. That alone would be more than enough to fill this contract?

A. Yes, sir.

Q. 151. And you in fact shipped some of that coal on this contract?

A. Yes, sir.

Q. 152. And you sold the balance of it to other people on the market generally?

A. Yes, sir.

Q. 153. Now, from about the first of June on, all of the coal you produced at this mine, you sold at the market price, didn't you?

A. Except the Railroad coal.

Q. 154. You observed that contract because they would not let a man have cars unless he stood up to his contract?

A. No, that was not the reason.

Q. 155. That is a fact, isn't it, you have to fill their contract or they refuse to let you have cars?

A. No, sir, that is not a fact. The Interstate Commerce Commission demands cars to be delivered. Back to the question as to whether or not I made any statement that the Tracy City Coal Company would go in bankruptcy, that is absolutely untrue, unfounded, and anybody who says it is absolutely mistaken; the Tracy City Coal Company is absolutely solvent, was at that time, is now; is [fol. 389] absolutely solvent for any judgment on full price or the contract price, much less the difference in the market price, and no intimation of that kind has ever before been made, or anything else of that kind.

Q. 156. During 1920, you did not own the majority of the stock of the Tracy City Coal Company?

A. No, sir.

Q. 157. What percentage did you own?

A. I owned a pretty good size, probably a fourth or a third.

Q. 158. And were numerous stockholders, or was it a close corporation?

A. Fairly close corporation.

Q. 159. Big majority of the stock was owned by a few men?

A. Well, there was, I guess eight or ten, maybe twelve different stockholders.

Q. 160. Was Mr. Beesley at that time a large stockholder?

A. He was a pretty good stockholder, R. A. Roberts and the Staubs were stockholders, there were assets of over a million dollars, a great deal on it was all paid in, the Company didn't owe but very little, their assets was four or five or six times more than their liabilities.

Q. 161. Later, you bought out all or approximately all of the stock, did you not?

A. No, sir, I bought a majority.

[fol. 390] Q. 162. You bought out Mr. Beesley?

A. Yes, sir.

Q. 163. Did you acquire a large majority during 1920?

A. No, sir.

Q. 164. Did your stock holdings increase during 1920 at all?

A. I don't think so.

Q. 165. And you think it was approximately 25 to 33 1/3%?

A. Something like that.

Q. 166. Mr. Flanagan, when you entered upon the negotiations of this last contract to sell and deliver that coal to the Federal Coal Company at \$9.00 a ton, why didn't you tell them of the fact that that coal was, in effect, the same coal they already had a contract for?

A. I don't know why I should have told them anything. They came to me and proposed to make this contract and this contract was \$1.00 a ton less than the market price, and said if I would make this contract, they would cancel this Tracy City Coal Company contract, and I hesitated over it, and I know of others they made that proposition, to contract with them at \$9.00 that refused to accept it, and in less than five minutes after the contract was made, Mr. Thompson said that if Mr. Bates would give them a certified check for \$10,000.00 they would turn the contract over to them; it seems they had considered a great consideration in making this contract for the cancellation of the other contract.

[fol. 391] Q. 167. At the time he made this contract, coal on the market was worth \$10.00 a ton?

A. Yes, sir, that was from the producer to the Broker, the Broker must have gotten \$10.50 and \$11.00; as a matter of fact, I had been selling them coal at \$10.00, which you know they didn't re-sell at \$10.00.

Q. 168. They were, you say, seeking you out to cancel a contract for 18,000 tons at \$3.90 in order to get a contract at \$9.00?

A. Yes, sir, their contract at \$3.90 was over a period of twelve months' time, while their contract of \$9.00 was for coal delivered right then while coal was high. After November on until the expiration of the first contract my mines were shut down for the want of sale for the coal at \$2.00 a ton, which would have been \$1.90 a ton on the other contract. There was a great deal of difference in the length of time of the contracts.

Q. 169. But at that time there was already a delinquency under the previous contract of some three months. That contract stipulated for the delivery of 8 cars a week or about 34 to 35 cars a month and under this contract they were getting only 50 cars?

A. Yes, sir. I don't consider that the other contract was delinquent that amount; we waited for six weeks or two months prior to the time we made the last contract, there never was any demand on me for shipments under the other contract and the agreement was reached, and it was not considered that I was delinquent or otherwise on that contract. I was ready to live up to the agree-[fol. 392] ment that had been agreed to, it was a question between the Federal Coal Company and Mr. Bates.

Q. 170. That is, you were ready to ship all the coal you could get and allow the Federal Coal Company 60-cents per ton commission?

A. As agreed to, yes.

Q. 171. They were to sell it for the best price they could get for it?

A. Yes, sir.

Q. 172. At the time that agreement was made about what was coal selling for?

A. It was not selling for so much at that time, probably \$6.50, maybe \$7.00, something like that.

Q. 173. Was Bates present when that agreement was made?

A. Yes, sir, the agreement was written out and everything ready to sign and he went to call Mr. Thompson over the telephone and they could not agree.

Q. 174. Now, where was it written, Mr. Flanagan?

A. By Mr. Thompson in Mr. Garner's office, Tracy City.

Q. 175. Mr. Garner was the attorney representing you in the matter?

A. Yes.

Q. 176. Mr. Joe Thompson was then there representing the Federal Coal Company?

A. Yes.

Q. 177. Mr. Bates was there representing himself?

A. Yes.

Q. 178. Why was it not completed if it was written out there with everybody present?

[fol. 393] A. Mr. Chrosniak didn't have the authority, it seemed, to trade with Mr. Bates on their agreement, and they went to the telephone office to call Mr. E. R. Thompson and they disagreed about the Chattanooga Coal Company's commission, which I knew nothing about; I had never seen the agreement, don't know what the disagreement was but the disagreement was between the two, but never a disagreement between me and the Federal Coal Company.

Q. 179. Where was it they went to call Mr. E. R. Thompson?

A. Down to the telephone office.

Q. 180. In Tracy City?

A. Yes, sir.

Q. 181. And when they came back what did they do about it?

A. Mr. Thompson said they could not tell, but he thought everything would be alright in a day or two, Mr. Bates would see the hand-writing on the wall and come around. I kept on waiting, sold them coal along every day or two, and Bates didn't come around; I kept selling coal on the open market all the time, and they come with this second proposition and I agreed to that. I agreed to everything they produced, I wanted to get the other contract cancelled and was willing to make a sacrifice in order to do it.

Q. 182. Why were you so anxious to get the other contract cancelled?

A. They were thoroughly solvent and would have depreciated the [fol. 394] value of my stock.

Q. 183. Even before this time you had been selling the Federal Coal Company on the open market, coal at the market price, had you not?

A. Yes, sir.

Q. 184. And you continued to sell them some long — afterwards?

A. Yes.

Q. 185. But was not shipping any under the Tracy City Coal Company?

A. No, sir, and Mr. Chrosniak was all the time threatening to sue, so that kindly scared me up; that is another reason I was willing to make a sacrifice.

Q. 186. Did you refuse to enter into this contract unless they released the Tracy City Coal Company?

A. Yes, sir, absolutely; I would not have gone into this contract at all had they not released the Tracy City Coal Company because I thought it was a bad contract, we all expected coal to go to \$12.00 or \$14.00 or \$15.00 a ton, all the coal men did.

Q. 187. The Railroad coal that was contracted for in the name of the Tracy City Coal Company, was that billed, and did they pay for that all in the name of the Tracy City Coal Company?

A. Yes, sir.

Q. 188. How long did that Railroad contract continue?

A. Until the next April.

Q. 189. And it was carried out, was it, clear on to the end?

[fol. 395] A. Yes, sir.

Q. 190. Was the Railroad price a better price than this \$3.90 or less?

A. Less, and it has been renewed from time to time up until the present time.

Q. 191. The time this \$3.90 contract was made, that was, you thought a good price for the coal?

A. Fair, yes, sir.

Q. 192. At that time you had no way of foretelling there was going to be a run-away market?

A. No, sir.

Q. 193. Did T. O. Busbee's agent contract to make any other contracts in the name of the Tracy City Coal Company except this one of April 12th?

A. No, sir.

Q. 194. When you sold coal from the Tracy City mines at \$9.00 a ton, what amount or royalty would you pay to the Tracy City Coal Company on that coal?

A. I would pay to the Tracy City Coal Company the same proportion at 45-cents is to \$2.90.

Q. 195. Can you just figure out an example so we can see how much it figures out?

A. That proportion is not right, that is as 35-cents is to \$2.90.

Q. 196. I have made calculations upon the corrected figure of 35 cents to \$2.90, as you have given me, and figure out \$1.08 per ton as the royalty payable on the coal sold at \$9.00. Please look over these figures and say if I figured it on the correct basis and [fol. 396] arrived at the correct result?

A. I think that is right.

Q. 197. Then in making the sale at \$9.00 a ton Tracy City Coal Company would be interested to the amount of \$1.08, and you would be interested in the remainder, which is \$7.92?

A. Yes, sir.

Q. 198. Who negotiated the contract with the Nashville, Chattanooga & St. Louis Railway Company in the name of the Tracy City Coal Company that we have been referring to?

A. In main Mr. Beesley did.

Q. 199. You assisted in the negotiation?

A. Yes, sir.

Q. 200. You authorized Mr. Beesley to negotiate the contract of April 12th. for 18,000 tons?

A. I did that on instructions from Mr. Beesley to do so.

Q. 201. Who negotiated and made the spot sales of coal that was shipped under these contracts, coal produced under this lease?

A. I did.

Q. 202. How much was called for shipment under the Railroad contract?

A. I could not just say, I think it was three cars a day.

Q. 203. Did you ship the full amount?

A. Approximately, not hardly; we didn't get sued.

Q. 204. And what did you tell me the output was at that time?

A. Approximately 300 tons a day.

Q. 205. That would be six to eight cars?

A. About six cars.

[fol. 397] Q. 206. And you had about three cars a day of free coal to sell on the market?

A. We had about three cars a day over the Railway Company's contract.

Q. 207. And that was sold on the market?

A. Some was shipped on contract, some sold on the market.

Q. 208. There was only, on this particular contract, 15 shipments?

A. There was not a great deal.

Q. 209. The rest of it was sold on the market?

A. Yes.

Q. 210. And it followed the market up as the market went up on up to \$10.00 and whatever was realized for it was credited to royalty and to you on the proportion of 35-cents to \$2.90?

A. Yes, sir.

Q. 211. Now, under what name did you operate this mine, or these mines of the Tracy City Coal Company?

A. Campbell Branch Coal Co.

Q. 212. Your shipping record that you file, shows that this Campbell Branch coal was bought at one price and sold at an additional price, of various amounts. Upon which of these two amounts was the royalty calculated?

A. Usually calculated on the small amount; that was Brokerage profit.

Q. 213. Was there any particular arrangement between you and the Campbell Branch Coal Company?

A. No, it all belonged to me, I just took it from one set of books to another set.

[fol. 398] Q. 214. And the price which you show here at which it was bought is really an arbitrary charge?

A. What I paid myself for it.

Q. 215. The shipping records that you have Exhibited begin with June, but I observe as early as April 1920, you contracted with Dr. C. W. Hembree to buy coal. You were, in fact, buying and dealing in coal then before the date of these records were you not?

A. Probably so.

Q. 216. You begin handling coal, buying and selling, about what time, did you say?

A. I think the Hembree contract was about the first.

Q. 217. The Hembree coal, how was it shipped and handled at first?

A. Just as individual, I think.

Q. 218. Was it bought with a view of filling this Beesley contract; was any intended to go on that contract?

A. No, sir.

Q. 219. That Hembree contract appears to run for a year. Then it was your purpose to engage in the individual brokerage business for as much as a year?

A. I expected to handle his coal.

Q. 220. Did you make other contracts besides the Hembree contract to buy coal?

A. No, sir, except with the Staubb boys.

Q. 221. Had you been selling and shipping coal previous to this June record that you have here on your own account?

A. Not to amount to anything.

[fol. 399] Re-examination.

By Judge J. J. Lynch:

Q. 1. Mr. Flanagan, was Mr. Busbee at any time your personal Agent?

A. No, sir.

Q. 2. Was this contract with the Chattanooga Coal Company in any manner your personal contract?

A. No, sir.

Q. 3. Were you under any personal obligation to fill that contract or be personally responsible for its breach in any manner?

A. No, sir.

Q. 4. I notice your contract with the Tracy City Coal Company binds you only to a minimum royalty of \$1,200.00 a month, and that you were not required to operate your mines except enough to produce that. I will ask you whether or not the Railway contract alone was enough to produce the \$1,200.00 a month?

A. Yes, sir.

Q. 5. I will ask you if there was any suit brought to recover for breach of the so-called Chattanooga Coal Company contract, there would have been any liability on you except as one of the stockholders in that Company?

A. That is all.

Q. 6. I will ask you if there was any personal agreement or understanding between you or Mr. Beesley or any other officer by which

you assumed any personal responsibility of carrying out that contract?

A. No, sir.

[fol. 400] Q. 7. Was there ever any obligation or contract or agreement between you and Mr. Beesley or any Officer of that Company that would bind that Company to have filled that contract out of the mines covered by that lease?

A. No, sir.

Q. 8. In other words was there any personal obligation on your part, Mr. Flanagan, beyond and above the literal terms of that contract?

A. No, sir.

Q. 9. They asked you about your different methods of keeping books and the entries and records made by you. Was there ever at any time a single record made or single transaction recorded that had any sort of connection with this transaction, that you have concealed or attempted to conceal?

A. No, sir, absolutely not.

Q. 10. Was there anything about your transactions in November or any other part of the time in 1920, or any other time, that you had any desire to conceal?

A. Absolutely not.

Q. 11. Was there anything pertaining to the Campbell Branch Coal Company charges you referred to awhile ago, or anything in connection with that that you had to conceal?

A. No, sir; as I said before, the small amounts there, from nothing to ten cents, I think some five cents, some ten, some nothing, was only a count, as I said, from one to the other, in handling these, the [fol. 401] different sheets and different things caused additional office help, which was additional expense, which was only transferred from the other account to this account to help pay that expense.

Q. 12. Was it a brokerage charge or charge for additional expense?

A. Expense charge I presume. I might have charged anything I wanted to, but I made it enough, as the record shows, to cover the expense.

Q. 13. I will ask you, Mr. Flanagan, if when you had the conversation, as you have described in your former deposition, with the office of the Federal Coal Company at Chattanooga, Tenn., who ever answered the phone, whether it was Mr. Thompson or Mr. Chrosniak, I will ask you whether or not they assumed to act for the Federal Coal Company?

A. Yes, sir.

Q. 14. I will ask you whether or not that was in response to your calls for the Federal Coal Company?

A. Yes, sir.

Q. 15. I will ask you whether or not who ever it was answered these calls, promised constantly to deliver all the coal undelivered under this contract?

A. Yes, sir.

Q. 16. How long and through what months did these promises continue?

A. From the very first time they begin to slack off on the contract, [fol. 402] and they would say, we expect to get some business in a few days, Chrosniak has gone off to look for business, in a few days we will have this business and then we will make it up. I think they took pretty well through September, they probably begin to slack up at the last, and through October, November and on up till in December; in December they begin to tell me I had better leave it in the ground that was the best place, they could not sell it, the market had all gone to the dickens and the ground was the best place.

Q. 17. And it was December before they absolutely declined to take it?

A. Yes.

Q. 18. Were these promises made prior to that date, through September, October and November, promises that were unconditional to take all the balance of this coal?

A. Yes, sir, and when they would get an order they would take an amount that would probably make up a little of what had been lost, and I was expecting them to catch that tonnage up; that was our understanding.

Q. 19. I notice from these Exhibits you have filed records and sales of Tennessee Consolidated Coal Company at \$5.25. Was this spot coal sold or was it under contract, if so, when was the contract made?

A. Under verbal contract.

Q. 20. When made?

[fol. 403] A. I think along in November for a certain amount. I don't just remember, until either the first of December or the first of January, I think though to the first of January.

Q. 21. I will ask you if there was ever at any time a disposition on your part to conceal anything or any fact from the officers or agents of this defendant Company?

A. No, sir.

Recross-examination.

By C. C. Moore:

Q. 1. When they begin to slow down on the taking of coal, as you have referred to, then you begin to call from time to time to know when they would take more coal?

A. Yes.

Q. 2. You think until about the first part of December they continued to claim that they were doing the best they could and would give you some more orders as soon as they could get them, and various things of that nature?

A. Yes.

Q. 3. And you patiently waited and continued from time to time to call?

A. Yes, sir.

Q. 4. Now, in the first part of December, when they begin to tell you, as you say, the best place for the coal was in the ground, what did you say to them?

A. I told them it was pretty hard; they said it was no harder on me than them, they were in the same boat with me.

Q. 5. Can you recall approximately what part of December that [fol. 404] conversation took place?

A. No, sir, I am sure it was in the first part, sometime before the 15th, I don't remember.

Q. 6. Do you recall then talking to them any further after that, during the month of December?

A. I probably talked to them another time or two, I don't remember, but not much about the coal.

Q. 7. Don't you know that that subject was mentioned?

A. No, sir, they told me they could not take any more.

And further this deponent saith not.

— — —, By Bessie M. Gorman, Stenographer.

Previously sworn to.

[fol. 405] DEPOSITION OF E. R. THOMPSON TAKEN IN CASE NO. 18758—Filed March 27th, 1922

The Deposition of E. R. Thompson, Taken by Agreement of Counsel on March 8th, 1922, at 2 o'clock p. m., at the Office of Federal Coal Co.

All formalities, caption, certificate and signature waived.

E. R. THOMPSON, being duly sworn, deposed as follows:

Direct examination.

By C. C. Moore:

Q. 1. Mr. Thompson, what is your position with the Federal Coal Co.?

A. Secretary & Treasurer.

Q. 2. What was your position on the 7th of April 1920?

A. Same.

Q. 3. I call you- attention to contract between the Federal Coal Co. and the Chattanooga Coal Co. made Exhibit "C" to the original bill in this case, and ask you if you are the E. R. Thompson, who executed the contract in behalf of the Federal Coal Company?

A. Yes, sir, I am.

Q. 4. After the execution of this contract state whether or not the Federal Coal Co. received from the Tracy City Coal Co. shipments of coal pursuant to the contract Exhibit "A" to the bill which is [fol. 406] assigned by the Federal Coal Company by this Exhibit "C"?

A. We did not receive shipments according to that contract; we got a few cars on it but nothing like what the contract called for.

Q. 5. Your records will show how much and on what dates shipments were received, will they?

A. Yes, sir.

Q. 6. Will you please make up and file as Exhibit "A" to this your deposition, a statement showing the shipments of coal received by the Federal Coal Company from the Tracy City Coal Company under this contract, negotiated through the Chattanooga Coal Company?

A. I will.

Q. 7. The contract between your Company and complainant Bates, Exhibit "C" to this bill stipulates that your Company is to pay the Chattanooga Coal Company twenty cents per ton on the coal shipped by the Tracy City Coal Company. State whether or not your Company did pay twenty cents per ton on the coal shipped by the Tracy City Coal Company?

A. Yes, sir, we did. That was handled in this way, the coal was actually invoiced by the Tracy City Coal Company to the Chattanooga Coal Company, the bills of lading were turned over to us with an invoice of the Chattanooga Coal Company, and in that way they covered their commissions on every car that was shipped.

Q. 8. At what price was it invoiced to you from the Chattanooga Coal Company?

A. \$4.10 per ton.

Q. 9. That was twenty cents per ton in excess of the price they had contracted for with the Tracy City Coal Co.?

A. Yes, they added twenty cents to the Tracy City Coal Company's invoice.

Q. 10. You say that only a part of this coal was shipped and delivered, why was the rest not shipped?

A. The market went up.

Q. 11. And whose fault was it, if any one's, state what took place?

A. As soon as the market began to advance the Tracy City Coal Company breached their contract by refusing to make shipments; they didn't have any excuses to make that were worth anything, but it was quite apparent that the reason they were not making shipments, they could get more money for the coal on the open market.

Q. 12. This contract stipulates for the shipment of the coal, the 18,000 tons of coal, at the rate of 8 cars per week. Approximately what was the weight of a car from the Tracy City section referred to in this contract?

A. I should say they ought to average about 45 tons.

Q. 13. State whether or not the Tracy City Coal Company during any week following the date of this contract shipped as much as eight cars per week as stipulated in the contract?

A. No, they didn't during any single week during the life of the contract ship eight cars.

Q. 14. For how long did they make partial shipments under the contract?

A. They made partial shipments as late as the last week in May; they made none whatever after the last day of May.

Q. 15. State whether or not the Federal Coal Company desired

and sought to procure the shipments stipulated in the contract, during that time?

A. We very much desired to obtain these shipments; did everything we possibly could to induce the Tracy City Coal Company to ship the coal.

Q. 16. State briefly some of the things you did to obtain this coal shipped according to the contract?

A. I made a habit to call Mr. Bates over the telephone almost [fol. 408] every day and I insisted that he do everything possible to coerce the Tracy City Coal Company to make shipments. At one stage of the game, I don't remember the date, we sent an attorney to Tracy City in company with Mr. Bates for the purpose of trying to induce the Tracy City Coal Company to live up to their contract. In fact we exhausted every means possible short of a lawsuit to enforce the contract.

Q. 17. Did your Company make direct appeals to the Tracy City Coal Company also to get them to make shipments?

A. We made no appeal except through the medium of our attorney in the visit to Tracy City just referred to. All of our other appeals were directed to Mr. Bates, insisting that he go on the Tracy City Coal Company; the Tracy City Coal Company didn't know us in the transaction.

Q. 18. When you were making these daily requests of Mr. Bates to get this coal shipped, what in a general way would be the nature of his replies to your requests?

A. He would claim that he was doing everything possible to induce the Tracy City Coal Company to make the shipments, as to what he was actually doing I don't know.

Q. 19. Any way you didn't get the coal?

A. No, sir.

Q. 20. The original bill filed by Mr. Bates in this case charges that the Federal Coal Company made a contract with the Tracy City Coal Company by which it released and excused the Tracy City Coal Company from performing this contract. State whether or not any such contract was made with the Tracy City Coal Company?

A. Not by me or the Federal Coal Company.

Q. 21. Was it made by any officer or agent representing the Federal Coal Company?

A. No, sir.

Q. 22. In the taking of testimony in this case there has been filed [fol. 409] in the record, copy of a contract, bearing date of August 19th, 1920, entered into between John D. Flanagan and the Federal Coal Company. State whether or not the Tracy City Coal Company had refused to make any further shipments under its contract long before this contract was entered into between the Federal Coal Company and Flanagan?

A. It had, yes, sir.

Q. 23. State whether or not the visit of your attorney you have referred to in company with Mr. Bates had taken place before that time?

A. Yes, sir, some time before that.

Q. 24. What was the attitude of the Tracy City Coal Company with respect to carrying out its contract?

Mr. Stanfield: We object to the attitude of the Company, because not asking for a specific act of the parties, and asking for the opinion of the witness.

A. Their attitude simply was that they refused to ship on the contract because the spot market was so much higher they could get so much more for the coal on the open market. I think as a matter of fact this coal was sold on the open market for much higher prices, and Mr. Bates bought considerable of it himself.

Q. 25. As a matter of fact, had the market price by the end of May very materially advanced?

A. Yes, sir, and was advancing almost every day.

Q. 26. Was it then considerably above the \$3.90 that was stipulated in this contract to be paid to the Tracy City Coal Company?

A. Yes, sir, considerably above that.

Q. 27. Approximately what was the market price beginning with June and from that time forward?

A. The first day of June it was approximately \$8.50 per ton, F. O. B. mines.

[fol. 410] Q. 28. State whether or not since this suit was brought by Mr. Bates, the Federal Coal Company has brought suit in the chancery court of Hamilton County, against the Tracy City Coal Company to recover damage for the breach of the contract entered into by that Company with Mr. Bates, and assigned to the Federal Coal Company by the contract of Bates?

A. Yes, sir, it has.

Mr. Moore: Notice is hereby given that the record of the suit of the Federal Coal Company against the Tracy City Coal Company and W. S. Bates will be offered in evidence on the trial of this cause.

Q. 29. That suit is pending as case No. 18888 on the Rule Docket of this court?

A. Yes, sir.

Q. 30. How were the invoices rendered to you by Mr. Bates in the name of the Chattanooga Coal Company paid by your Company, that is, were they paid to Bates or the Tracy City Coal Company?

A. They were paid to Bates promptly on receipt of invoices, as I remember.

Cross-examination.

By Foster V. Brown:

Q. 1. That was because you said the Tracy City Coal Company didn't know you in the transaction?

A. Yes, because they didn't know us and they invoiced the coal to Bates and Bates invoiced it to us.

Q. 2. This Exhibit to the deposition of John D. Flanagan is the

contract between the Federal Coal Company and John D. Flanagan, dated August 19, 1920?

A. This Exhibit you hand me is apparently a copy of the contract.

Q. 3. The Federal Coal Company has now sued the Tracy City [fol. 411] Coal Company on that contract with Mr. Bates, made with them?

A. Yes, sir.

Q. 4. The Tracy City Coal Company or Flanagan has sued the Federal Coal Company on this contract for the sale of coal at \$9.00 a ton, have they not?

A. Mr. Flanagan has sued us.

Q. 5. That suit is pending in the Chancery Court, is it?

A. I don't know what court, it is pending somewhere.

Q. 6. Your suit against the Tracy City Coal Company or Flanagan Coal Company was brought after they had sued you, wasn't it?

A. I don't know.

Q. 7. This contract between Flanagan and the Federal Coal Company was made before you sued the Tracy City Coal Company on its contract, wasn't it?

A. It probably was, Mr. Brown, but I don't remember the dates, the contracts bear dates for themselves.

Q. 8. You know that you made the contract in regard to the Bates contract at the same time you agreed to take the coal at \$9.00 a ton, didn't you; it was all in the same contract, wasn't it?

A. I don't understand you.

Q. 9. The contract releasing the Tracy City Coal Company from its contract to furnish the coal at \$3.90 a ton was in the same contract in which you agreed to take coal at \$9.00 from Flanagan?

Mr. Moore: The contract between the Federal Coal Company and Flanagan is in evidence and shows for itself and is the best evidence of what it contains.

A. I don't remember, I think they are both in the same instrument.

Q. 10. Did Flanagan furnish the coal under contract at \$9.00 or who did furnish the coal; who did it come from?

A. It came from Flanagan as far as I know.

[fol. 412] Q. 11. Was it shipped by the Tracy City Coal Company?

A. No, sir.

Q. 12. How were the bills made to you, in favor of whom?

A. Cumberland Mountain Coal Company.

Q. 13. Well, was that owned by the Tracy City Coal Company?

A. Not so far as I know.

Q. 14. You know Flanagan didn't own it, don't you?

A. I think that he does. I know that he swears he does, he is sole owner and that is his trade name.

Q. 15. How much was shipped under that contract?

A. I think about 70 odd cars.

Q. 16. About how much would that be, how many tons would that be?

A. Say, 3,000 to 3,500 tons.

Q. 17. How did it happen they didn't ship on?

A. We didn't take the balance.

Q. 18. Why didn't you take it?

A. The market went down.

Q. 19. And you breached that contract?

Mr. Moore: I except to the foregoing question because it is wholly immaterial.

Q. 20. Flanagan is claiming the breach of that contract against you and when he claimed that and filed this bill you filed a bill against him, against the Tracy City Coal Company?

Mr. Moore: I except to the foregoing question because it is argumentative and immaterial, and because the records are the best evidence of what suits were brought.

Q. 21. Is it true, Mr. Thompson, that you went out there and cancelled the contract of the Tracy City Coal Company when the coal was to be furnished at \$3.90 per ton, the coal having gone up, and [fol. 413] agreed to take so many thousand tons from Flanagan at \$9.00 and received about 3,000 tons, did you say—

A. I didn't say, I said approximately.

Q. 22. And after the coal went down the Federal Coal Company declined to take any more coal?

Mr. Moore: I except to that.

A. Not exactly.

Q. 23. What was it?

A. We made a trade with Mr. Flanagan to take a certain amount of coal from him. We had it sold to other parties. For some reason they could not, or would not take the coal; when they didn't we would not take it.

Q. 24. Why didn't you take it?

A. Because our customer would not take it from us.

Q. 25. You didn't agree to sell it to someone else, The Federal Coal Company was making the contract?

A. Yes.

Q. 26. The Federal Coal Company simply failed to accept the coal from Flanagan, didn't he?

Mr. Moore: The foregoing line of examination is excepted to because it is wholly foreign to this lawsuit or any issue in it, and because the matters of difference between the Federal Coal Company and Flanagan are under investigation in that case, and ought not to be inquired into in this case.

Q. 27. I am asking you, and I want to know, if it is not true that you breached your contract with Flanagan in failing to take the coal?

Mr. Moore: I will ask the witness not to answer the question, don't think the Chancellor would require him to answer.

Q. 28. Do you know when you commenced the suit of the Federal Coal Company against Flanagan?

[fol. 414] A. I have no idea of the date.

Q. 29. Did he commence suit against you on the \$9.00 ton contract before you commenced the suit on the contract of the Tracy City Coal Company?

A. I don't know.

Q. 30. Will you furnish from the books of your Company a statement showing the date and the amount of the coal that was shipped under the contract made with Flanagan, copy of which is made exhibit in this record?

A. Yes, sir.

Q. 31. When was the last shipment that Flanagan made?

A. I have no idea.

Q. 32. When was the last shipment made by the Tracy City Coal Company?

A. To whom, in what case?

Q. 33. Under contract that was made with Mr. Bates?

A. The last shipments were made the latter part of May 1920.

Q. 34. How many tons had been shipped up to that time.

A. I don't know.

Q. 35. How much was due up to that time under the contract?

A. There was due and unshipped on the last day of May 2,087.8 tons.

At this point, complainant gave notice that he would read on the hearing record in case of John D. Flanagan vs. Federal Coal Company.

Re-examination.

By C. C. Moore:

Q. 1. State whether or not the Tracy City Coal Company during this time from April, through the year 1921, was engaged in business at Tracy City, Tenn.?

[fol. 415] A. I am reasonably certain they were engaged in the business continuously during that period.

Q. 2. What was their business?

A. Mining of coal.

Q. 3. State whether or not they also bought and sold coal in addition to mining?

A. I have been lead to believe they were also engaged as Brokers.

Q. 4. Who had charge and management of the business of the Tracy City Coal Company?

A. Mr. John D. Flanagan.

Q. 5. What was his title?

A. He was vice president of the Corporation, and I think they called him General Manager as well.

Q. 6. Was or not Mr. John D. Flanagan still the Vice-President and General Manager of the Tracy City Coal Company on August 19th, 1920 when he negotiated this contract on his individual behalf?

A. He was.

Q. 7. In the suit about which you were asked on cross-examination, for the alleged breach of this contract of August 19th, Mr. Flanagan is suing in his own behalf and not in the behalf of the Tracy City Coal Company?

A. Yes, he is suing individually.

Q. 8. You have stated that the coal that was delivered to you by Mr. Flanagan was billed to you in the name of the Cumberland Mountain Coal Company, which Mr. Flanagan claimed to be using as a trade name in his independent business. State how your payments for that coal were made?

A. I think they were made by checks, payable to the Cumberland Mountain Coal Company.

Q. 9. By whom were those checks endorsed and used?

A. I could not state positively without looking them up.

[fol. 416] Q. 10. Will you please take some one of them, a sample of the several checks and file it as an exhibit to this deposition to show how they were endorsed and used?

A. Yes, sir.

Q. 11. State whether or not Mr. Flanagan at any time claimed that the Tracy City Coal Company had any interest whatever in the coal that he was selling under the contract that he negotiated with you on the date of August 19th?

A. He did not at any time claim the Tracy City Coal Company had any connection whatever or any interest in it.

Q. 12. Who was the President of the Tracy City Coal Company Mr. Thompson, at that time?

A. Mr. J. C. Beasley.

Q. 13. Where did Mr. Beasley reside?

A. Murfreesboro, Tenn.

Q. 14. Is the Tracy City Coal Company a Corporation?

A. Yes, sir.

Q. 15. About when did Mr. John D. Flanagan set up an individual business for himself as a coal broker?

A. My recollection is he was operating a brokerage during all of 1920, I don't know whether he was so engaged previous to that time or not, I had no dealings with him previous to 1920.

Mr. Moore: Notice has been given by adversary counsel that the record in the case of John D. Flanagan against the Federal Coal Company will be offered in evidence in this case.

Q. 16. I show you the original deposition with its Exhibits given by John D. Flanagan as a witness on his own behalf in that case, and ask you to say what is the date of the privilege license taken out [fol. 417] by Mr. Flanagan under which he claims to have opened his business as a Broker in 1920?

A. The date is June 18th, 1920.

Q. 17. Attached to that deposition Mr. Flanagan is a number of sheets which he has filed, and which he testifies represents the business done by him as a Broker of coal in his own interest and behalf, under the three different styles in which he did business, first

as John D. Flanagan Coal Company; next for about a week as Cumberland Coal Company, and during the principal part of the time as Cumberland Mountain Coal Company. I will ask you to refer to that exhibit and state what period of time it covers?

A. The transactions seem to start on June 1st, 1920 and end in December of that year.

Q. 18. How many cars of coal did Mr. Flanagan buy and sell as a broker in June 1920, according to his record, which he files?

Mr. Stanfield: The foregoing line of questions objected to because calling for a transaction between one John D. Flanagan and the Federal Coal Company, and is calling for the reading of the answer by the witness from the record of Flanagan. The record being the best evidence.

A. 53 cars.

Q. 19. This record being already offered in evidence by Adversary counsel and for the convenience of the Court I will ask you to look to it and say how many cars were shipped by Flanagan in July 1920?

A. 103.

Q. 20. State the same information for August 1920?

A. 132.

Q. 21. The same information for September, 1920?

A. 126.

[fol. 418] Q. 22. October 1920, the same?

A. 178.

Q. 23. November, 1920?

A. 118.

Q. 24. December, 1920?

A. 74.

Q. 25. What was the business of J. C. Beasley, the President of the Company during that period of time?

A. My information is that he was running a Municipal Water Plant Company at Murfreesboro.

Mr. Stanfield: The foregoing answer objected to because the witness has no personal knowledge of the facts and he is answering on information.

Q. 26. Did he have any charge of the immediate operations of the Tracy City Coal Company during that period?

A. He was president of the Company and probably was consulted about important things but the management of the affairs of the Company were in the hands of Mr. John D. Flanagan.

And further this deponent sayeth not.

Signature waived.

Sworn to before me this the 8th day of March, 1922. B. M. Gorman, Notary Public. (Seal.)

EXHIBIT "A" TO DEPOSITION OF E. R. THOMPSON

Cars Received from Chattanooga Coal Co. as Comping from Tracy City Coal Co. under Contract with Them

		Tons	
1920			
April 20th. L&N	80293.....	58.80	
[fol. 419]			
22nd. SOU	188433.....	59.85	
22nd. WM	13884.....	57.15	
28th. IC	210808.....	58.50	
28th. L&N	7794.....	52.25	
29th. L&N	80582.....	58.40	
30th. NYNH&H	52116.....	48.30	
30th. NA	35661.....	43.50	
30th. IC	210275.....	58.50	
		—	495.25
1920			
May 20th. SOU	183776.....	52.	
21st. B&O	148282.....	39.60	
28th. N&C	35555.....	44.90	
5th. HV	26311.....	44.95	
10th. B&O	136189.....	54.75	
		—	236.20
			731.45

EXHIBIT "B" TO DEPOSITION OF E. R. THOMPSON

Coal Received by the Federal Coal Company from the Cumberland Mountain Coal Company on Contract Entered Into August 19th, 1920, as Shown by Records of the Federal Coal Co.

Date	Car initial & number	Tons	Purchase price	Amount
9/ 1/20.	Frisco 85250.....	59.90	9.00	539.10
2	N&C 32859.....	31.80	"	286.20
	N&C 35937.....	30.80	"	277.20
	N&C 35937.....	43.35	"	390.15
3	SOU 98240.....	50.90	"	458.10
	L&N 62968.....	47.00	"	423.00
4	PRR 294924.....	48.35	"	435.15
[fol. 420]				
9/ 7/20.	STL&SF 80407.....	56.85	9.00	571.65
	L&N 6004.....	44.90	"	404.19
8	NYC 315376.....	44.95	"	404.55
	NYC 346699.....	40.65	"	365.85
9	KCF&M 81677.....	57.25	"	515.25
	C&O 42792.....	56.95	"	512.55
10	CC&O 42272.....	54.45	"	490.05
	LV 21832.....	55.95	"	530.55
16	L&N 74151.....	58.60	"	527.40
	CBQ 17723.....	60.25	"	542.25
	ABA 58040.....	61.35	"	552.15
17	PL 721674.....	61.10	"	549.90
	SOU 170539.....	78.60	"	707.40
	CEI 81423.....	48.90	"	440.10
18	N&C 40071.....	57.50	"	517.50
	P&R 72934.....	60.10	"	540.90

Date	Car initial & number		Tons	Purchase	Amount
				price	
	N&C	40110.....	56.80	9.00	511.20
20	SOU	181395.....	62.70	"	564.30
	SOU	186375.....	62.90	"	566.10
21	SOU	199574.....	58.05	"	522.45
	CC&O	42705.....	57.40	"	516.60
	L&N	79093.....	58.90	"	530.10
23	CC&O	20710.....	54.70	"	492.30
24	PRR	187761.....	73.80	"	.....
	IC	202025.....	58.20	"	.....
	CBQ	83749.....	55.95	"	2,199.15
	ACL	80738.....	56.40	"	.....
25	B&O	139543.....	57.60	"	.....
	IC	124838.....	60.10	"	1,059.30
10/ 5/20.	Erie	41730.....	55.60	"	500.40
	PRR	294211.....	49.85	"	448.65
	COFGA	19216.....	53.10	"	477.90
	L&N	34399.....	57.95	"	521.55
6	C&O	62907.....	57.50	"	517.50
[fol. 421]					
10/ 6/20.	C&O	37863.....	60.10	9.00	540.90
	L&P	913286.....	77.55	"	697.95
11/ 4/20.	K&M	55,577.....	47.25	8.50	401.62
6	COFG	19523.....	51.45	"	437.33
10	N&C	35301.....	47.55	"	404.17
12	N&C	6439.....	54.95	"	467.07
	HV	20340.....	53.05	"	450.92
	CBQ	175910.....	55.00	"	467.50
	CMSTP	31657.....	52.20	"	452.50
	HV	128488.....	47.65	"	405.02
	LNE	3568.....	51.90	"	441.15
15	B&O	229782.....	53.00	"	450.50
16	N&C	40038.....	54.00	"	459.00
18	N&C	40058.....	51.40	"	436.90
20	NYNH	54516.....	50.05	"	425.42
22	L&N	70640.....	55.55	"	472.18
24	C&NW	109689.....	53.00	"	459.50
30	SOU	186203.....	52.90	"	449.65
12/ 2/20.	IC	127412.....	52.40	"	445.40
4	SP	54513.....	53.00	"	450.50
6	CHL	30149.....	53.05	"	450.92
11	NC	40024.....	55.60	"	472.60
	SOU	187484.....	50.05	"	425.42
12/14/20.	SOU	182713.....	52.10	"	442.85
16	Erie	31312.....	52.70	"	447.95
20	COFG	20029.....	48.60	"	413.10
22	SOU	188408.....	53.50	"	454.75
24	CTHSE	11091.....	49.75	"	422.87
28	C&A	40146.....	49.55	"	421.17
29	C&NW	84879.....	51.95	"	441.57
30	L&N	71833.....	55.10	"	468.35
31	COFG	20244.....	54.55	"	463.68

3,959.40

73 cars.

[fol. 422] EXHIBIT "A" TO DEPOSITION OF JOHN D. FLANAGAN

Privilege License

No. 73. Original

State and County

Grundy County, Tennessee

Whereas, Cumberland Mountain Coal Company having paid into my hands the sum of Six and 25/100 Dollars, for the use of the State and Six and 25/100 Dollars, for the use of the County, also the fees hereon endorsed, is therefore, licensed to exercise the privilege of dealing in Coal and Coke for Three months, from the 18th day of June 1920.

A. W. Campbell, Circuit Court Clerk. E. C. Shelton, Clerk,
By W. G. Roddy, Deputy County Court Clerk.

State Tax	\$6.25
County Tax	6.25
School Tax .....	....
— Tax .....	....
County Court Clerk's Fees	1.00
Circuit Court Clerk's Fee- .....	.50
Total	<u>\$14.00</u>

Issued June 18th, 1920.

Expires September 18, 1920.

Received from—	Date	Initial & No.	Price	Tons	To whom consigned
Campbell Branch Coal Company.....	9/ 1	Frisco	\$2.00	59.90	Logan, Jacksonville, Fla.
"	9/ 1	NC	.....	31.90	"
"	9/ 2	N&G	.....	30.80	"
"	9/ 2	N&C	.....	43.35	"
"	9/ 3	SO	.....	50.90	"
"	9/ 3	L&N	.....	47.00	"
"	9/ 4	PRR	.....	48.35	"
"	9/ 7	ST&SF	.....	56.85	"
"	9/ 7	L&N	.....	44.90	"
"	9/ 8	NYC	.....	44.95	"
"	9/ 8	NYC	.....	40.65	"
Staeb Coal Co.....	9/ 9	KOF&SM	.....	57.25	"
Campbell Branch Coal Co.....	9/ 9	C&O	.....	56.95	"
"	9/10	C&O	.....	54.45	"
"	9/10	LV	.....	55.95	"
"	9/16	L&N	.....	58.60	Fed. Coal Co., Atlanta,
"	9/16	CB&Q	.....	60.25	"
"	9/16	ABA	.....	61.35	"
"	9/17	SOU	.....	61.10	"
"	9/17	PL	.....	78.60	"
"	9/17	CEI	.....	48.90	"
"	9/18	PR	.....	60.10	"
"	9/18	N&C	.....	57.50	"
"	9/18	N&C	.....	56.80	"
Staeb Coal Co.....	9/20	SO	.....	62.76	Goldy & G., Savannah,
Campbell Branch Coal Company.....	9/20	SO	.....	58.05	Ga.
"	9/21	SO	.....	62.90	"
"	9/21	CC&O	.....	57.40	"
"	9/21	L&N	.....	58.90	C. C. Co., Cedartown, Ga.
"	9/23	CC&O	.....	54.70	"

Received from—	Date	Initial & No.	Tons	Price	To whom consigned
Campbell B. C. Co.....	11/15	R&O	53.00	.....	"
"	11/16	N&C	54.00	.....	"
"	11/18	N&C	51.40	.....	"
Staub Coal Co.....	11/20	NYN&HH	50.05	.....	"
Campbell B. C. Co.....	11/22	I&N	55.55	.....	"
Staub Coal Co.....	11/24	C&NW	53.00	.....	"
Campbell B. C. Co.....	11/26	HV	53.05	.....	"
"	11/27	CB&Q	55.00	.....	"
"	11/30	SO	52.90	.....	"
Shipped on the Account of Federal Coal Co., November, 1920.					
[fol. 426]					
Received from—	Date	Initial & No.	Tons	Price	To whom consigned
Campbell Branch Coal Co.....	12/ 2	IC	52.40	\$8.50	Q. M. Key West, Fla.
"	12/ 4	SP	53.00	.....	"
"	12/ 6	CHL	53.05	.....	"
"	12/ 8	LNE	51.90	.....	"
"	12/11	N&C	55.00	.....	"
"	12/11	SO	50.05	.....	"
"	12/14	SO	52.10	.....	"
"	12/16	Erie	52.70	.....	"
N. C. Sartin.....	12/20	C of G	48.00	.....	"
"	12/22	SO	53.50	.....	"
"	12/24	CYH&SE	49.15	.....	"
"	12/27	HV	47.65	.....	"
"	12/28	C&A	49.55	.....	"
"	12/29	CNW	51.95	.....	"
"	12/30	I&N	55.10	.....	"
"	12/31	C of G	54.33	.....	"

Shipped on the Account of the Federal Coal Co., December, 1920.

[fol. 427] EXHIBIT #4 TO DEPOSITION OF JOHN D. FLANAGAN

Order

Federal Coal Company, Chattanooga, Tenn.

Our Order No. #9821

Sept. 24, 1920.

To: John D. Flanagan.

At: Tracy City, Tennessee.

Please make shipment for our account as follows:

To: National Paper Company.

At: Bolton, Georgia.

When: At Once.

Quantity and description: 1 car Tracy City R. O. M.

Price: \$9.00.

Show us as shippers and send us notice of shipment and Bill of Lading as soon as possible.

Yours very truly, Federal Coal Company, By E. R. Thompson,
Secretary & Treasurer.

[fol. 428] EXHIBIT #10 TO DEPOSITION OF JOHN D. FLANAGAN

Federal Coal Company, Chattanooga, Tennessee

Tracy City, Tenn., Sept. 1, 1920.

All Bills due on the first of each month.

Bought of Cumberland Mountain Coal Company

Sept. 1, Frisco, #85250, 1,198 lbs., 59.90 tons, RM, \$9.00, \$539.10.

On contract.

[fol. 429] EXHIBIT "D" TO DEPOSITION OF JOHN D. FLANAGAN

Tracy City, Tenn., April 12, 1921.

Federal Coal Company,
Chattanooga, Tenn.

GENTLEMEN:

My books shows a loss of Twenty-eight Thousand Two Hundred Forty One Dollars and thirty three cents has been sustained by me by reason of your breach of coal contract entered into with me on the 19th day of August, 1920 for a period of four months. I have complied in every respect with my part of the contract, and, at your re-

quest, had Mr. J. S. Beesley of Murfreesboro enter his personal security that I should carry out the terms of the contract.

If you desire to settle without litigation, please let me hear from you promptly.

In the event I fail to hear from you within a reasonable time, I shall conclude that you refuse to make any settlement out of court.

Respectfully, John D. Flanagan.

[fol. 430] EXHIBIT "F" TO DEPOSITION OF JOHN D. FLANAGAN

Telegram

September 20, 1920.

John D. Flanagan,
Tracy City, Tennessee:

Ship to Godley and Griffin Savannah Georgia until further advised.

Federal Coal Company.

Charge: Federal Coal Company.

[fol. 431] EXHIBIT "H" TO DEPOSITION OF JOHN D. FLANAGAN

This contract made and entered into by and between Staub Coal Company, a domestic corporation, party of the first part, and John D. Flanagan of Tracy City, Tennessee, party of the second part, witnesseth:

Party of the first part leases to party of the second part and party of the second part leases to party of the first part for a period of one year beginning on July 24, 1920 and ending on July 23, 1921, all the coal under the surface of what is known as "Farmer's Camp Hill," or "Q Mine Hill" in Grundy County, Tennessee, and located about five miles North of Tracy City, Tennessee. Second party agrees not to interfere with the operation of the working of Tom Rose now operation on West part of said Hill, said operations of said Rose is not included in the territory herein located.

Second party agrees to pay first party the sum of Twenty-five cents per ton royalty on all coal mined by him under this lease, payable on the first of each month for the coal mined in the previous month, railroad weights to govern.

Witness our hands this the 24th day of July, 1920.

(Signed) Staub Coal Company, By C. E. Werner, President.
John D. Flanagan. G. M. T., Secretary.

[fol. 432] EXHIBIT I TO DEPOSITION OF JOHN D. FLANAGAN

This contract made and entered into by and between John D. Flanagan of Tracy City, Tenn., party of the first part, and Staub Coal Company, party of the second part, witnesseth:

Party of the first part leases to the party of the second part and party of the second part leases to the party of the first part, all the coal under the surface of what is known as "Farmer's Camp Hill" or "Q Mine Hill" in Grundy County, Tennessee, and about five miles north of Tracy City, Tenn. The territory leased herein does not include the operations of Tom Rose who is now operating on the west side of said Hill, and his operations are not included in this lease.

The territory so leased is for the purpose of mining coal therefrom and the same is to be delivered on board the railroad cars at the tippie of first party. Second party obligates himself to mine from said territory a reasonable turn No. 1 Sewanee run of mine coal, the same to be at all times commercially free from foreign substances and a marketable grade and to deliver the same to the place above specified at the price of \$6.75 per ton of 2,000 pounds.

Second party obligates himself to furnish the following:

Mine cars and iron rails and switches, and all other necessary tools and supplies and to work all coal down to 22 inches in thickness at its own expense, and to operate the mines in a minor like manner.

This lease will take effect on 26th of July, 1920, and expire on 23rd day of July, 1921.

Second party agrees to hold first party harmless as to any damage to any of its employees.

First party agrees to settle with second party for all coal mined on the 1st and 15th of each month, railroad weights to govern all settlements.

Witness our hands this the 26th day of July 1920.

(Signed) John D. Flanagan. C. E. Werner, By President.
G. M. T., Secretary.

[fol. 433] EXHIBIT "J" TO DEPOSITION OF JOHN D. FLANAGAN

This contract made and entered into by and between John D. Flanagan, party of the first part and Staub Coal Company, a corporation organized and existing under and by virtue of the laws of the state of Tennessee, party of the second part, witnesseth.

Party of the first part agrees to purchase of the party of the second part and party of the second part agrees to sell to party of the first part from 1 to 3 railroad cars per week or run of mine coal of the Sewanee Seam to be delivered by party of the second part on board railroad cars at the mines of the party of the second part in Grundy County, Tenn. for a period of six months from the date hereof.

Said party of the first part agrees to pay said party of the second part a minimum price of \$7.00 per ton of 2,000 pounds for said coal so delivered during said period of 6 months. In the event, however, party of the second part is able to sell said coal on the market at a price exceeding \$7.50 per ton of 2,000 pounds the party of the first part will pay to the party of the second part the sale price of said coal less eight per cent of said sale price, which eight per cent will be retained by party of the first part as his commission. In no event, however, is party of the first part to pay to party of the second part less than \$7.00 per ton for said coal delivered as above provided.

The delivery of the coal by the party of the second part to the party of the first part as above provided shall not be enforced and shall not be construed to apply in the event party of the second part is unable to deliver the same on account of strikes, lockouts or other labor troubles or any other unavoidable delay, but if party of the second part shall be unable for the above reasons to make said delivery, this contract and all obligations hereunder shall cease and terminate at the end of said 6 months.

Party of the first part will pay to party of second part for said coal so delivered when party of the first part is presented with a bill of lading for same.

This contract executed in duplicate on this the 15 day of July 1920.

(Signed) John D. Flanagan. C. E. Werner, By President.
 ———, Secretary.

[fol. 434] EXHIBIT "K" TO DEPOSITION OF JOHN D. FLANAGAN

This agreement, made and entered into this the 6th day of April 1920, by and between Dr. C. W. Hembree, party of the first part and John D. Flanagan, party of the second part, witnesseth:

The party of the second part agrees to take, and the party of the first part agrees to furnish f. o. b. railroad cars Tracy City, 2 cars per week of a fair grade wagon run of mine Sewanee coal for a period of 12 months from this date. The same to be all times subject to the inspection of the second party.

The party of the second part agrees to pay for all coal when the railroad weights are presented to him at three Dollars and Fifty Cents (\$3.50) per ton of 2,000 pounds.

It is distinctly understood and agreed that the party of the first part shall not be held liable for non-shipment of coal if prevented by reason of strikes, lockouts, shortages of cars, exhaustion of coal, or any unforeseen condition or accidents not due to fault or negligence on the part of the party of the first part.

It is understood and agreed that the prices named herein are based on existing rate of pay to mine labor, and if there is a general raise in mine labor in the 19th District, second party agrees to absorb this increase.

Witness our hands, this the 7th day of April, 1920.

C. W. Hembree, Party of the First Part. John D. Flanagan,
Party of the Second Part. Irene Sanson, Witness.

[fol. 435] EXHIBIT "C" TO DEPOSITION E. R. THOMPSON

Federal Coal Company

Number 5530

To Cumberland Mountain Coal Company, Tracy City, Tenn.

Chattanooga, Tenn., September 6, 1920.

Distribution	Date of account		
	9/1/20	539.10	
	9/2/20	953.55	
Acct. 3,514.22	9/3/20	881.10	
	9/3/20	1,140.47	
		<u> </u>	3,514.22
			<u>3,514.22</u>

This Voucher, when properly signed and endorsed becomes Sight Draft on Hamilton National Bank, Chattanooga, Tennessee.

E. R. Thompson, Secretary & Treasurer.

(Stamped on face:) First National Bank, Chattanooga, Tenn.
Paid through Clearing House Sept. 20, 1920.

(Stamped on face:) All prior endorsements guaranteed. Pay to the order of any Bank or Banker Sept. 28, 1920, Cumberland Valley National Bank, Nashville, Tenn. V. J. Alexander, Cashier.

Endorsements: Cumberland Mountain Coal Co., by John D. Flanagan, President. (Stamped:) Pay to the order of any Bank, Banker or Trust Co. All prior endorsements guaranteed. Sept. 28, 1920, Wartrace Bank & Trust Co., Wartrace, Tenn., Chas. Butler, Cashier. (Stamped:) Prior endorsements guaranteed; Pay to the [fols. 436 & 437] order of any bank or banker, Sept. 28th, 1920, Cumberland Valley National Bank, Nashville, Tenn., V. J. Alexander, Cashier.

IN CHANCERY COURT OF HAMILTON COUNTY

FINAL DECREE—Enrolled June 5th, 1922 [Omitted; printed side p. 261]

[fol. 438] BOND OF FEDERAL COAL CO. ON APPEAL [For \$250.00; omitted in printing]—Filed June 15, 1922

No. 18888

FEDERAL COAL CO.

vs.

TRACY CITY COAL CO. & W. S. BATES

[fol. 439]

No. 18713

JOHN D. FLANAGAN

vs.

FEDERAL COAL COMPANY

APPEAL BOND OF JOHN D. FLANAGAN—Filed June 6th, 1922 [For \$250; omitted in printing]

[fol. 440] IN CHANCERY COURT OF HAMILTON COUNTY

No. 18713

Parties

JOHN D. FLANAGAN

vs.

FEDERAL COAL COMPANY

DOCKET ENTRIES

Rule Docket

Solicitors: C. H. Garner, Allison, Lynch & Phillips, C. C. Moore.
1921.

- May 6. Original bill filed, 5/6/ Ex. "A" to bill filed.
 " " Prosecution bond, Allison, Lynch & Phillips sureties.
 " " Copy bill 1,500 w. and spa. to ans. iss'd and ret'd 5/9
 served on E. R. Thompson, M'gr defendant Co. by A.
 T. Ballew, D. S.

- Jun. 29. Ans. of Federal Coal Co. filed, notice.
 Spt. 27. Issues of fact filed Notice.
 " " Motion to hear issues of fact filed, notice.
 Oct. 12. " to assign for trial filed, notice.
 " 15. " C. C. Moore to withdraw papers.
 Feb. 16. Deposition E. R. Thompson, John Chrosniak, Dr. D. W. Hembree, John K. Werner, and Jno. D. Flanagan, notice given.
 " Deposition of John D. Flanagan filed.
 " Exhibits A-B-C-D-E-F-G-H-I-J-K-L to deposition of John D. Flanagan filed.
 " Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, to depo.; John D. Flanagan.
 Feb. 21. Motion C. C. Moore to withdraw papers.
 Mch. 22. Deposition W. T. Thrasher, H. L. Cory and T. O. Busbee, filed.
 " Ex. 1 to "A" to depo. H. L. Cory, filed.
 " Motion to set for trial filed, notice.
 Mar. 29. " C. C. Moore to withdraw papers.
 [fol. 441]
 Apr. 4. Decree granting leave to file amend ans. and cross bill Q-676 Amended ans. and cross bill, filed, notice given.
 " Prosecution bond, C. C. Moore surety.
 " Service acknow. for def't by Allison, Lynch & Phillips.
 Apr. 7. Spa. to test to Rutherford Co. 4/14 issued for Isaac H. Roberts, and ret'd. 4/7 served by C. A. Lenoir, D. S.
 Apr. 7. Spa. to test Grundy Co. 4/14 issued for E. B. Roberts, Irene Sanson, Theona Morgan, and ret'd. served by I. M. Sartain, Shff.
 " 18. Answer of John D. Flanagan to cross-bill, filed.
 " 24. Depositions T. O. Busbee, C. E. Werner, E. H. Garner, R. L. Latimer, John Chrosniak, E. B. Roberts, Irene Sanson, and J. D. Flanagan filed.
 " Exhibits 31, 32, 33, 34 to depo.; John Chrosniak filed.
 " Depo.: W. T. Thrasher, John Chrosniak, E. R. Thompson, W. S. Bates.
 " Depo.: E. R. Thompson, John Chrosniak, Winifred Smith, and Mrs. Luther Talley, filed to notice.
 " Exhibits 1-2-3-4-5-6-7 to depo.: E. R. Thompson, filed.
 " Depo.: J. C. Beasley filed.
 " Depo.: John D. Flanagan filed.
 " Exhibits M-N-O-P to depo.: John D. Flanagan, filed notice.
 Apr. 27. Exhibits to depo.: W. S. Bates, filed (checks).
 Jun. 1. Memo. opinion of Chancellor filed.
 Jun. 2. Motion I. G. Phillips to withdraw papers.
 " " " C. C. Moore to withdraw memo. opin.

- Jun. 5. Final decree &c. Praying appeal 2—198.
 " 6. Appeal bond John D. Flanagan \$250 with C. H. Garner and Allison, Lynch & Phillips, sureties filed.
 Jun. 15. Appeal bond Federal Coal Co. \$250 and T. R. Preston filed.
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[fol 442] IN CHANCERY COURT OF HAMILTON COUNTY

No. 18888

Parties

FEDERAL COAL COMPANY

vs.

W. S. BATES and THE TRACY CITY COAL COMPANY

DOCKET ENTRIES

Rule Docket

Solicitors: Moore & Lynch, Allison, Lynch & Phillips, C. H. Garner.

1921.

- Aug. 24. Original bill filed 8/24 Exhibit to bill filed.
 " Prosecution bond Moore & Lynch sureties.
 " Copy of bill 2,000 w. and spa. to ans. issued for W. S. Bates.
 Aug. 29. Ans. of Tracy City Coal Co. filed, notice.
 " Spa. to ans. ret'd. 8/25 served by A. T. Ballew D. S.
 Spt. 17. Ans. of W. S. Bates filed notice.

1922.

- Jan. 25. Motion of C. C. Moore to withdraw papers.
 Apr. 4. Allowing filing of sup. and amend. bill ordered.
 " Supp. and amended bill filed vs. John D. Flanagan.
 " Serv. acknow. for John D. Flanagan by J. J. Lynch.
 Apr. 18. Ans. of Tracy City Coal Co. filed notice.
 " Ans. of John D. Flanagan filed.
 " Motion to require compl't to elect which def't he will proceed against filed, notice.
 Apr. 24. Depo. W. T. Thrasher, John Chrosniak, E. R. Thompson W. S. Bates, filed.
 " Petition of Federal Coal Co. filed.
 " Depo.: J. C. Beasley filed.
 " " John D. Flanagan filed.
 " Ex. M-N-O-P to depo.: John Flanagan filed.

Apr. 21. Decree electing by compl't to proceed against Tracy City Coal Co. in lieu of John D. Flanagan, R-56.

May 1. Decree requiring W. S. Bates to file correspondence and checks, R-88.

[fol. 443]

June 1. Memo. of Chancellor filed notice

June Term

1922.

Jun. 5 Final decree Praying appeal 2-198.

[fol. 444] STATE OF TENNESSEE:

CHANCERY COURT OF HAMILTON COUNTY

CERTIFICATE OF CLERK & MASTER

I, Sam Erwin, Clerk & Master of the Chancery Court of said County hereby certify that the foregoing three hundred and fifty five pages of words and figures, comprise a full, true and perfect transcript, as required by the rules of the Supreme Court, of all the records, pleadings, exhibits, proof and proceedings had by said court, in the cause wherein Federal Coal Co. is the complainant and Tracy City Coal Co. the defendant, No. 18,888; and John D. Flanagan the complainant, and Federal Coal Co. the defendant, No. 18,713, as the same remains of records and on file in my office.

Witness my hand and the seal of said court, at Office in the City of Chattanooga, Tennessee, this the 8th day of September 1922.

(Signed) Sam Erwin, Clerk & Master.

[fol. 445] — IN SUPREME COURT OF TENNESSEE

[Title omitted]

Hamilton, Equity

OPINION—Filed March 17, 1923

Memorandum

These consolidated causes grew out of two coal contracts, for the breach of which a suit was brought in each cause.

The bill in the second cause, as above styled, and hereinafter referred to as the Flanagan suit, was filed on May the 6th 1921, and its purpose was to recover for the breach of a contract entered into on August the 19th 1920, whereby the complainant was to sell and deliver to the defendant two hundred cars of Tracy City mine run coal at \$9.00 per ton F. O. B. cars at the mine, to be delivered at the rate of fifty cars per month, beginning September the 1st, 1920.

It is not seriously insisted here that the defendant did not breach the contract, but the Chancellor dismissed the bill for the reason that the complainant was a dealer in coal without having paid the necessary privilege tax.

Without taking the time to discuss the matter in detail, it is sufficient to state that we have carefully read the authorities sub-[fol. 446] mitted by counsel, and are of the opinion that the Chancellor reached the right conclusion, and since his opinion accords with our views, we here copy that portion of same dealing with this question as follows:

"But in making this contract and in delivering coal under it, Flanagan was engaged in the business of dealing in coal, i. e., buying coal to sell again and selling it. He handled very little, if any, coal of his own production, and not anything like enough to fill this contract. In saying this I do not count the coal from the mines of the Tracy City Coal Company as his production. While he was the lessee under the lease from that company, yet at this time those mines were being operated by the Campbell Branch Coal Company. The record of his transactions which he files here shows that all the coal which he sold during this period he purchased from some other person or corporation, and all the coal which he delivered to the Federal Coal Company he bought from the Campbell Branch Coal Company, and probably owned all of its capital stock; nevertheless, it was the legal entity which operated the Tracy City mines and sold the coal to him. This was more than a merely legal conception. It had a practical effect. The price at which the corporation sold the coal to him was less than the price at which he sold it to the Federal Coal Company, and the royalty paid to the Tracy City Coal Co. was computed on the price which he credited to the Campbell Branch Coal Company. He himself calls the difference his commission or brokerage charge. He cannot get away from the fact, and ought not to be allowed to get away from the fact, that in this transaction he was a dealer in coal.

"At the date of the execution of this contract Flanagan had paid the privilege tax for 2 months which the State of Tennessee imposes upon coal dealers and had a license for that period. But the license expired on September 18th. The parties continued to operate under the contract after that date and the breach did not occur until in December. If a license was necessary in the first instance, it was necessary as long as Flanagan continued to deliver or offer to deliver coal in execution of the contract. The license was never renewed or the tax paid after September 18th.

"It is insisted that a license was not necessary, because this was interstate commerce. It would be presumptuous for me to review the decision of the Supreme Court and undertake to define interstate commerce. In a very late decision, in the case of Dahnke-Walker Milling Co. v. Bondurant, that court said:

"The commerce clause of the Constitution, art. 1, Par. 8, cl. 3, expressly commits to Congress and impliedly withholds from the

several states the power to regulate commerce among the latter. Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into another for purpose of sale, [fol. 448] the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. *Brown v. Maryland*, 12 Wheat, 419, 446, 447, 6 L. Ed. 638, 688, 689; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 519, 48 L. ed. 538, 546, 24 Sup. Ct. Rep./365. On the same principle where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation * * * A corporation of one state may go into another without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause. *Crutcher v. Kentucky*, 141 U. S. 47, 57, 35 L. Ed. 649."

"Hence, it was held that a Tennessee corporation which purchased wheat in Kentucky from a Kentucky farmer, which it intended to ship to Tennessee, was not required to comply with the statute of Kentucky prescribing the conditions upon foreign corporations might do business in that State. The purpose and intention of the buyer to transport the wheat out of the State in accordance with its previous practice, though this was not a part of the contract of purchase, was held sufficient to constitute the transaction of interstate commerce and exempt the buyer from the statute. In the case at bar, it is proposed to extend the effect of the purpose and intention of the buyer to transport the coal out of the State, likewise no part of the contract, so as to protect the seller also from [fol. 449] the operation of a Statute of the State, although the seller was not a party to any contract for the sale or transportation of the coal outside of Tennessee, and his obligation ended with the delivery of the coal on the cars at Tracy City in this State. It is easy, of course, to say that there cannot be a purchase without there being at the same time a sale, and that if the purchase was a part of interstate commerce, the sale must have been also. But the statute did not impose any tax upon the mere sale of the coal. Had this been Flanagan's coal he would not have been liable to the tax, no matter where or to whom he sold it. The thing that is taxed is the privilege of dealing in coal. What made him liable to the tax was the fact that he was engaged in buying coal to sell again. Not having paid the tax and obtained a license to do that business, he cannot recover upon any contract for the sale of coal so bought.

Kritland v. Corbett, 144 Tenn., 100.

"If the insistence of counsel is correct, it seems to me that the principle would as a matter of logic, (but interstate commerce is not a matter of logic) have to embrace the seller's vendor as well as the seller and so on to ramifications without limit."

The bill in the other cause was filed on August the 24th 1921, and will be referred to hereinafter as the Bates suit. The defendants to that suit were W. S. Bates and the Tracy City Coal Company. About two years later the bill was amended so as to make Flanagan a party defendant, but upon final hearing no relief was sought against him.

[fol. 450] The purpose of that suit was to recover damages for the breach of a contract entered into on the — day of April, 1920, whereby the Tracy City Coal Company, incorporated, contracted to sell to W. S. Bates, doing business as the Chattanooga Coal Company, 18,000 tons of coal at the price of \$3.50 per ton, to be delivered at the rate of eight cars per week from April the 12th 1920 to April the 12th 1921. Bates resold this coal to the Federal Coal Company at an advance of twenty cents per ton. Only fourteen cars were ever delivered.

The facts, briefly stated, are as follows: The Tracy Company owned coal mining property in the vicinity of Tracy City, Tennessee, which, previous to the making of the contract sued on in this cause, it had leased to Flanagan on royalty. The coal that was mined belonged to Flanagan as lessee, and he sold it to whom he pleased, except as to a contract which the Tracy Company had with the N. & C. Railroad Company, which he assumed. At that time Flanagan was a minority stockholder in the Tracy Company, and was its vice president and general manager. He and Mr. Beasley, the president of the company, owned a majority of the stock, and it seemed to be known by the stockholders that this contract was made in the name of the company and they acquiesced in same.

In April 1920, Flanagan began to buy, sell and deal in coal generally, and bought coal from other mines and other parties. He authorized one T. O. Busbee, a coal broker at Chattanooga, to sell coal in the name of the Tracy Company. Busbee had sent a circular letter to the trade advertising the coal for sale at \$4.00 per ton, which came to the attention of the Federal Company. Busbee had previously placed a contract with the Federal Company, and the latter was suing him and there was feeling between them. The Federal Company gave information to W. S. Bates that Busbee was offering this coal for sale at \$4.00 per ton, and agreed to pay Bates ten cents per ton advance if he would buy the coal and resell to it. Bates bought the coal at \$3.90 and sold it to the Federal for \$4.10. The coal was billed to the Bates Company and paid for by it, and Bates in turn billed the coal to the Federal Company at the advance price and the Federal Company paid Bates. Said contract was executed on behalf of the Tracy City Coal Company by Busbee as agent, and the coal was consequently shipped and billed in the name of the Tracy City Coal Company. ✓

By July 1920, this coal had advanced from around \$4.00 per ton to about \$10.00 per ton, due largely to the increased cost of production, and the Tracy City Company, or Flanagan, were shipping Bates, or the Federal Company, practically no coal.

The Federal Company was exceedingly anxious to obtain coal and was having trouble in procuring a sufficient quantity of coal at the

then market price to supply its trade. In this situation, in July 1920, it had a conference with Flanagan and Beasley, the result of which was a compromise of all differences as embodied in the contract subsequently on August the 19th 1920, under the terms of [fol. 452] which the Bates contract was canceled.

In this suit this was set up in the answer as a defense, to meet which the complainant took the position that said contract of August the 19th 1920, was obtained by fraud, and that it was without consideration.

The question of fraud is so fully elucidated in the opinion of the Chancellor that we quote from his opinion as follows:

"The charge of fraud is predicated upon two grounds, viz: 1st—That Flanagan fraudulently concealed from the Federal Coal Company the fact that he was the undisclosed principal in the Bates contract. This involves three propositions: first, that he was such undisclosed principal; second, that he concealed the fact; and third, that in the situation of the parties it was a material matter to the Federal Coal Company in making the new contract. It is a fact that Flanagan did not, at the time of making the August 19th contract, or at any time before, state to the Federal Coal Company's representatives that he was the principal in the Bates contract, or that he was personally bound to Bates for the fulfillment of that contract. He has never admitted it since that time, and by his counsel is strenuously arguing to the contrary now. There was nowhere any express agreement between him and the Tracy City Company, either written or oral, that he was to be the principal, which he can be charged with concealing. If he was principal, it was because the law imposed that obligation upon him from the facts con-[fol. 453] stituting his relationship to the contract and to the Tracy City Coal Company. Upon consideration of all the evidence as to the facts, I have reached the conclusion that he is liable as principal, but a good deal can be said in favor of the contrary view, and I cannot say that he was guilty of fraud in failing to reach the same conclusion as I do and disclosing it to the Federal Coal Company. No fact is pointed out which it was his duty to disclose, and which he failed to disclose or concealed. On the contrary, in the draft of the tentative agreement of July 7, 1920, his relations to the Bates contract was all but explicitly stated, and enough was stated to put the Coal Company upon inquiry. Its managing officer, who passed this tentative agreement, says he made no inquiry, and he does not claim that he was led not to make inquiry by any act or false statement of fact by Flanagan. I think it plain that the Federal Coal Company was not at the moment concerned about who was liable for the breach of the Bates contract. They were advised that they 'could not get anywhere' in the enforcement of this contract, from which the fair inference is that they were under the impression that that contract could not be enforced by the Federal Coal Company as assignee, which was the position taken by the Tracy City Coal Company. Then, this was a time of feverish excitement. The price of coal was advancing by leaps and bounds. It was, as one of the wit-

nesses calls it, a 'run-away' market. What the coal company wanted [fol. 454] was coal, not a claim for damages. So, for the sake of getting coal, it was willing to release the old contract of doubtful enforceability in its hands, and make a new one which would be at a price nearer the market price than the old contract, and which called for completion of delivery within the time the excitement might be expected to last. When asked whether he would have made the new contract if he had known that he was getting no more than another promise from Flanagan, Mr. Thompson only says, 'I think I probably would not have made it.' Failure to disclose a fact, the influence of which would have been as doubtful as is indicated in this answer, is not sufficient ground for avoiding a contract.

"2nd. That the financial condition of the Tracy City Coal Company was misrepresented to the Federal Coal Company. The witness Chrosniak testified that, after the conference held in Tracy City, on July 7th, at which a compromise agreement was tentatively agreed upon, Flanagan, Vice-President and Manager of the Tracy City Coal Company, stated to him upon the street that a judgment against the Tracy City Coal Company for the damages for the breach of the Bates contract would *for the damages for the breach of the Bates contract* force that company to bankruptcy, and that the same statement was made to him at another place on the same day by J. C. Beasley, the president of the company. This is denied by Flanagan and Beasley, and for obvious reasons appearing in the record Chrosniak's statement cannot be accepted as true. On the occasion referred to Beasley did say to Chrosniak that a judgment against the company of the size suggested by him would 'wipe it off the map' [fol. 455] and that its paid-in capital stock was only \$40,000. It is conceded for the Federal Coal Company, formally upon the record, that in making this statement Beasley committed no fraud. In view of this concession, I am unable to see how this statement can be considered a ground for setting aside the contract for fraud.

"Furthermore, while Chrosniak took part as a representative of the Federal Company in the negotiations for a new contract, he had no authority to decide upon and consummate the same. That was the province of its general manager, E. R. Thompson. It does not appear that Chrosniak ever communicated to Mr. Thompson either the statement which Beasley did make or the statement which he now says Flanagan and Beasley both made, or that these statements influenced Mr. Thompson in any way in entering into the contract of August 19th with Flanagan. Mr. Thompson states that he had some information concerning the Tracy Coal Company's title and understood 'in a general way, even if we get judgment we might not be able to collect it.' He does not say from whom he received his information, or that he led him to make any inquiries upon the subject. This only confirms what has been stated above, that he was not concerned with the questions of responsibility for the breach of the Bates contract. This ground of fraud is not made out."

Taking the record as a whole, we are of the opinion that the charge [fol. 456] of fraud has not been sustained. The record tends to indicate that the Federal Company knew of the relationship of Flanagan to the Tracy City Coal Company, and, in our opinion, it was put upon notice of such fact, at least to the extent of requiring investigation, by the tentative agreement of July the 15th 1920, which was drafted by the attorney of the complainant, who is a brother to the complainant's manager. We copy from said agreement as follows:

"Whereas, by virtue of certain contracts heretofore entered into, the Campbell Branch Coal Company and John D. Flanagan of Tracy City, Tennessee, have an interest in the performance of the contract entered into by the Tracy City Coal Company and any claim which may be presented on account of the alleged breach thereof."

It is then recited:

"The parties, in consideration of the premises, agree to a settlement and compromise, and the basis of this compromise is the new contract, therein entered into."

This agreement was written out more than a month before the contract was finally executed, and gave the complainant ample opportunity to ascertain the facts.

We are also impressed with the idea that this suit is retaliatory in its nature, and in all probability would never have been instituted [fol. 457] had not Flanagan instituted his suit against the Federal Company.

We are further of the opinion that there was sufficient consideration to support said contract, and refer to the printed brief of the defendants, pages 58 to 64, where this question is discussed, and where the consideration relied upon, that we consider sufficient, is set forth.

In our opinion, the decree of the Chancellor meets the equity of these causes, and taking the record as a whole, we are of the opinion that from a standpoint of justice neither party is entitled to recover from the other. Each flagrantly violated its contract, and the loss in one cause should, in fairness, be offset against the loss in the other.

Upon the whole, we are pleased to affirm the decree of the Chancellor, and the costs in both the Chancery Court and this court will be divided.

McKinney, J.

[fol. 458]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

Hamilton, Equity

DECREE

These consolidated causes came on to be heard upon a transcript of the record from the Chancery Court of Hamilton County, assignments of error, reply brief and argument of counsel, upon con-

sideration whereof the Court is of opinion that in the decree of the Chancellor there is no error.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be in all things affirmed; that the original bill and supplemental bills be dismissed and that the Federal Coal Company and T. R. Preston, surety, will pay one-half of the costs of this cause, for which let execution issue. The remaining half of the costs of the cause will be paid by John D. Flanagan, principal and C. H. Garner, and Allison, Lynch and Phillips, sureties, for which let fi. fa. issue.

Office of Clerk of the Supreme Court for the Middle Division of the State of Tennessee

I, David S. Lansden, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the Decree of said Court, pronounced at its December term, 1922, in case of Federal Coal Co. et al. vs. W. S. Bates et al. —.

[fol. 459] IN SUPREME COURT OF TENNESSEE

STIPULATION AND AGREEMENT OF COUNSEL AS TO EXHIBITS

In this case it is agreed by and between counsel for both parties as follows:

Exhibit "A" to the original bill in the case of John D. Flanagan vs. Federal Coal Company is a correct copy of the contract between the parties involved in this litigation.

It is further agreed that Exhibit 4 to the deposition of John D. Flanagan is typical of the shipping orders sent by Federal Coal Company to petitioner Flanagan for the shipment of the coal shipped by said Flanagan under the contract sued on in this case.

It is further agreed that Exhibit 10 to the deposition of said Flanagan is typical of the invoices sent by said Flanagan to Federal Coal Company for coal shipped by him on the orders of Federal Coal Company, Cumberland Mountain Coal Company being one of the trade names under which petitioner Flanagan did business.

It is further agreed that Exhibit "L" to the deposition of John D. Flanagan showed all the coal bought and sold by him between June 1, 1920 and December 31, 1920; that all the said coal was bought by him from different mines, f. o. b. cars at Tracy City, Tennessee, and he sold it just as he bought it; that during the said time the said Exhibit shows Flanagan handled 672 carloads of coal in this way, of which

48	were handled in June.
94	" " " July.
100	" " " August.
121	" " " September.
167	" " " October.
78	" " " November.
64	" " " December.

After the 18th of September, 1920, this Exhibit shows that in the month of September he bought and resold to the United States Fuel Corporation of Chattanooga, Tennessee, 11 cars; to the Tennessee Consolidated Coal Company of Tracy City, Tennessee, 6 cars; [fol. 460] to H. L. Cory Coal Company of Chattanooga, Tennessee, 2 cars; to I. H. Roberts of Tracy City, Tennessee, 1 car; to M. B. Walker, 1 car; to W. W. Jones, 2 cars; and to Hibbler-Barnes Coal Company of Chattanooga, Tennessee, 14 cars; to the Federal Coal Company 15 cars.

During October, 1920:

To the U. S. Fuel Corporation of Chattanooga.....	75 cars.
To the Tennessee Consolidated Coal Co. of Tracy City....	25 "
To Hibbler-Barnes Coal Company of Chattanooga.....	29 "
To Federal Coal Company of Chattanooga.....	7 "

and to various other parties smaller amounts.

During November, 1920:

To the U. S. Fuel Corporation of Chattanooga.....	5 cars.
To the Tennessee Consolidated Coal Co. of Tracy City....	34 "
To H. L. Cory Coal Company of Chattanooga.....	21 "
To the Federal Coal Company of Chattanooga.....	14 "

and to various other parties smaller amounts.

During December, 1920:

To the U. S. Fuel Corporation of Chattanooga.....	10 cars.
To the Tennessee Consolidated Coal Co. of Tracy City....	21 "
To H. L. Cory Coal Company of Chattanooga.....	17 "
To Federal Coal Company of Chattanooga.....	16 "

All said coal was consigned as ordered by the purchasers named.

The said Exhibit shows that the last coal shipped by said Flanagan during the said period was shipped on the order of Federal Coal Company on December 29, 30 and 31, 1920, under the contract of August 19, 1920, on which Flanagan sues.

It is further agreed that all the coal shipped on the order of Federal Coal Company under said contract sued on was shipped in the name of Federal Coal Company—i. e., the bills of lading were taken from the railroad company at Tracy City, Tennessee by said Flanagan, or the mines, in the name of the Federal Coal Company as shippers, the coal being consigned according to orders theretofore [fol. 461] given by said Federal Coal Company.

James J. Lynch, Attorney for Petitioner John D. Flanagan.

Chas. C. Moore, Attorney for Respondent Federal Coal Company.

[fol. 462]

IN SUPREME COURT OF TENNESSEE

Consolidated Causes

[Title omitted]

STIPULATION AND AGREEMENT OF COUNSEL AS TO TRANSCRIPT OF
RECORD

It is hereby agreed by and between counsel for both parties that the foregoing transcript, numbered from pages 1 to —, inclusive, contains all the record and proceedings in the Supreme Court of Tennessee which are necessary or material for a determination of the issues to be presented to the United States Supreme Court by the Petition for Certiorari of John D. Flanagan, and the Clerk of the Supreme Court of Tennessee is directed to certify under his hand and seal that the above and foregoing transcript is a true, perfect and complete copy of the said transcript as here stipulated and agreed to by counsel.

It is further stipulated and agreed that if at any time prior to the consideration of this petition by the Supreme Court of the United States, either party should desire any part of the transcript filed in the Supreme Court of the state of Tennessee certified to the Supreme Court of the United States which is not shown in the above and foregoing transcript, such part of said transcript may be certified and filed upon the request of either party to this case.

James J. Lynch, Attorney for Petitioner John D. Flanagan.

Chas. C. Moore, Attorney for Respondent Federal Coal Company.

[fol. 463]

IN SUPREME COURT OF TENNESSEE

CLERK'S CERTIFICATE

Office of the Clerk of the Supreme Court for the Middle Division of
the State of Tennessee

I, David S. Lansden, Clerk of the said court, do hereby certify that the above and foregoing is a true, perfect and complete copy of the transcript as stipulated by counsel of said court as the same appears of record now on file in my office in the consolidated cases of Federal Coal Company vs. W. S. Bates, et al. and John D. Flanagan vs. Federal Coal Company, decided by the Supreme Court of Tennessee on March 19, 1923.

In testimony whereof I hereunto set my hand and affix the seal of the court, at office in the Capitol at Nashville, Tennessee, on this the 26th day of May, 1923.

David S. Lansden, Clerk Supreme Court. [Seal of Supreme Court, Nashville.]

[fol. 464] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM,
1923

No. 346

[Title omitted]

ORDER GRANTING CERTIORARI

On Petition for Writ of Certiorari to the Supreme Court of the State
of Tennessee

On consideration of the petition for a writ of certiorari herein to
the Supreme Court of the State of Tennessee and of the argument of
counsel thereupon had,

It is now here ordered by this Court that the said petition be, and
the same is hereby, granted, the record already on file as an exhibit
to the petition to stand as a return to the writ.

November 19, 1923.

(1500)

END

U. S. Supreme Court, U. S.

FILED

MAY 29 1923

WM. R. STANSBURY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1923.

26
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No. 345-175

JOHN D. FLANAGAN, PETITIONER,

vs.

FEDERAL COAL COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF TENNESSEE.

JAMES J. LYNCH,
C. H. GARNER,
Counsel for Petitioner.

(29,653)



IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1923.

No. 346.

JOHN D. FLANAGAN, PETITIONER,
versus
FEDERAL COAL COMPANY, RESPONDENT.

PETITION FOR CERTIORARI.

To the Honorable the Supreme Court of the United States:

Petitioner, John D. Flanagan, in support of this, his petition for a writ of certiorari to be directed to the Supreme Court of the State of Tennessee to review a decree of judgment rendered March 17, 1923, which affirmed the judgment of the Chancery Court of Hamilton County, Tennessee, rendered on June 5, 1922, respectfully shows:

First. This action was begun in the Chancery Court of Hamilton County, Tennessee, by John D. Flanagan, a resident of the State of Tennessee, against Federal Coal Com-

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pany, a corporation chartered and organized under the laws of the State of Delaware, having its principal office in Chattanooga, Hamilton County, Tennessee. The cause of action stated in petitioner's said bill of complaint was that he was the owner and operator of certain coal mines in Grundy County, Tennessee, and was also engaged in the coal brokerage business—that is, in buying and selling coal; that on August 19, 1920, petitioner Flanagan and defendant Federal Coal Company entered into a contract by the terms of which petitioner Flanagan was to sell and deliver to the defendant 200 cars of Tracy City run of mines coal at \$9.00 per ton f. o. b. cars at the mines, which coal, by the terms of the contract, was to be delivered between September 1, 1920, and December 31, 1920, fifty cars per month. The bill then charged that petitioner Flanagan was ready, able and willing at all times during the said time mentioned in said contract to deliver the said coal and comply with the said contract; that he began to call on defendant for shipping instructions on September 1, 1920, and shipped every car defendant would accept; that defendant accepted only 73 cars and failed, refused, and declined to accept 127 cars. The bill then charged that coal began to decline in price soon after said contract was entered into and continued to decline, and that this was the reason defendant refused to accept the coal. The bill then charged that if defendant had accepted the coal at the time and price provided in the contract petitioner would have made a clear profit on the 127 cars which defendant failed and refused to accept of \$28,241.33, this amount being the difference between the market price and the contract price each month defendant should have accepted said coal under the terms of the contract.

The bill then charged that if petitioner was entitled to recover damages fixed upon the basis of the difference between the market price and contract price at the time of the final breach of the contract, on December 31, 1920, rather than such difference by the month during the term of said contract, his damages would amount to \$40,000.00, the market price at the date of the final breach of said contract December 31, 1920, being \$2.00 per ton.

The prayer of the bill was for a recovery of \$40,000.00 or a recovery of \$28,241.33, if the court should be of the opinion that damages should be computed monthly during the term of the contract.

SECTION 2. The answer of defendant admitted the execution of the contract and set up as a defense against liability the fact that by the provision of chapter 134 of the Acts of the Legislature of Tennessee of 1919, petitioner Flanagan was required to pay a privilege tax as a wholesale dealer and broker in coal, both to the State of Tennessee and to the county of Grundy, as a condition precedent to engaging in said business; that by the provisions of said act it was a misdemeanor for petitioner to exercise said privilege without first paying said privilege tax; that he had not paid said tax and therefore "the contract herein was entered into in violation of said provisions of law and is illegal and void."

SECTION 3. The record, a certified copy of which is presented herewith, shows that Federal Coal Company, the purchaser of the coal and respondent in the case, was also engaged in mining coal and in doing a wholesale brokerage business in coal; that it was a Delaware corporation with its mines in the State of Kentucky and its home office in Chatta-

nooga, Tennessee; that it had not complied with the said act of the Legislature of Tennessee with respect to paying the privilege tax hereinbefore mentioned, the reason for its non-compliance with this act being shown by it, and being undisputed, to be that its business was exclusively interstate. It neither produced nor sold any coal in the State of Tennessee. All the coal it sold, or could lawfully sell, including the coal bought from petitioner Flanagan, was sold and shipped to purchasers outside the State of Tennessee. Federal Coal Company sold to purchasers outside the State of Tennessee this coal it contracted to buy from petitioner Flanagan. These purchasers declined to carry out their contracts, whereupon Federal Coal Company declined to carry out its contract with petitioner Flanagan and breached it.

Under the terms of the said contract and the practice followed by the parties, the coal delivered and to be delivered by petitioner Flanagan was loaded and to be loaded in cars at Tracy City, Tennessee, and billed out from that point direct to the customers of Federal Coal Company outside the State of Tennessee.

The Chancellor held that defendant, Federal Coal Company, breached its contract, but that petitioner Flanagan could not recover for this breach, solely because he had not paid the said privilege tax. It was insisted in that court that Flanagan was not liable for this tax because this transaction was interstate commerce. Upon this question, however, that court held that the statute in question imposed a tax upon the privilege of dealing in coal, and that inasmuch as Flanagan had bought the coal and then sold it to the Federal Coal Company under the contract hereinbefore mentioned, he was dealing in coal and subject to this tax, notwithstanding

the fact that the coal was bought for delivery to purchasers outside the State of Tennessee, was to be delivered f. o. b. cars consigned to such purchasers, and as much of it as was delivered was, in fact, delivered to such purchasers outside the State.

Upon appeal by Flanagan, the Supreme Court of Tennessee affirmed the Chancellor. The Supreme Court quotes and adopts in full the opinion of the Chancellor on this point. All the defenses interposed by Federal Coal Company in this said suit were specifically decided by the Chancellor and by the Supreme Court of Tennessee in favor of petitioner Flanagan, except the defense that Flanagan was liable for the said privilege tax and, not having paid it, could not recover.

It is shown by the record, and in nowise disputed, that petitioner Flanagan did business under a trade name or names, and that under one of these trade names he paid the said privilege tax for a period of three months, to wit, from June 18, 1920, to September 18, 1920, but he made no further payment for the period after September 18, 1920.

In connection with this case of Flanagan *vs.* Federal Coal Company, and consolidated and tried with it, there was another case of Federal Coal Company *vs.* W. S. Bates, Tracy City Coal Company and Flanagan. The issues and evidence in that case, however, have no bearing upon the question of Flanagan's liability for the said privilege tax. In that case it was claimed by Federal Coal Company that Flanagan had breached a contract made by Tracy City Coal Company and assumed by him and was liable to Federal Coal Company for this breach. One of Flanagan's defenses in that suit was that the contract of August 19, 1920, between Flanagan and Federal Coal Company, which is sued on in the case of Flana-

gan *vs.* Federal Coal Company, expressly released Tracy City Coal Company from all liability for damages on account of its breach of that contract. The Chancellor and Supreme Court both held that this defense interposed by Flanagan in that suit was a good one; that Flanagan was not liable to Federal Coal Company in any amount or on any account, and the bill in the said case of Federal Coal Company *vs.* Bates, Flanagan and others was dismissed by both said courts.

The issues in this said case of Federal Coal Company *vs.* Bates, Flanagan and others were material with respect to some of the defenses interposed by Federal Coal Company in the case of Flanagan *vs.* Federal Coal Company, but were in nowise relevant or material to the issue upon which alone the Chancellor and Supreme Court specifically decided against Flanagan, to wit, that he was not engaged in interstate commerce and therefore could not recover, because he had not paid the said privilege tax. However, in order that this court may see from the record itself and the opinion of the Chancellor and the Supreme Court that the issues and evidence in the said case of Federal Coal Company *vs.* Bates, Flanagan *et al.* in nowise affect the question upon which alone Flanagan's case against Federal Coal Company was decided against him, a transcript of this consolidated case of Federal Coal Company *vs.* Bates, Flanagan *et al.* is included in the record filed in this court.

SECTION 4. The question of law for determination by the Chancery Court and by the Supreme Court of Tennessee was, as stated, whether the contract executed between Flanagan and Federal Coal Company and the business done and proposed to be done under that contract was interstate commerce. Under repeated decisions of this court we submit the

contract and the business done and proposed to be done under this contract was interstate commerce and not subject to taxation by the State of Tennessee, and therefore Flanagan could not be denied a recovery solely because he had not paid said privilege tax.

SECTION 5. There is filed with this petition a certified copy of the record from the Supreme Court of Tennessee.

Wherefore your petitioner prays that a writ of certiorari may issue out of and under the seal of this court directed to the Supreme Court of the State of Tennessee, commanding that court to certify the case to this court for review and determination, as provided in the act of Congress known as the Judicial Code, or that your petitioner may have such other and further relief in the premises as to this court may seem appropriate and in conformity with the said act.

And your petitioner will ever pray.

JOHN D. FLANAGAN,

By Attorneys.

JAMES J. LYNCH,

C. H. GARNER,

Attorneys.

STATE OF TENNESSEE,

Hamilton County:

John D. Flanagan, being duly sworn, says that he is the petitioner named in the foregoing petition, that he has read the same and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information, and belief.

JOHN D. FLANAGAN.

Sworn to and subscribed before me this May 28, 1923.

[Seal of I. G. Phillips, Notary Public, Hamilton
Co., Tenn.]

I. G. PHILLIPS,
Notary Public.

FILED
MAY 5 1924
WM. R. STANSBURY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1923.

No. 2475

JOHN D. FLANAGAN, PETITIONER,
versus
FEDERAL COAL COMPANY

BRIEF AND ARGUMENT FOR
PETITIONER.

JAMES J. LYNCH,
C. H. GARNER,
Counsel for Petitioner.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1923.

No. 346.

JOHN D. FLANAGAN, PETITIONER,

versus

FEDERAL COAL COMPANY

BRIEF AND ARGUMENT FOR
PETITIONER.

STATEMENT OF THE CASE.

On August 19, 1920, petitioner John D. Flanagan entered into a contract with defendant The Federal Coal Company under the terms of which Flanagan sold to the coal company 200 cars of Tracy City run of mines coal at a price of \$9.00

per ton f. o. b. cars at the mines, to be shipped 50 cars per month, between September 1, 1920, and December 31, 1920. (Record, pages 27, 28.)

At the time this contract was entered into, Flanagan was a coal dealer doing business at Tracy City, Tennessee, under the trade name of the Cumberland Mountain Coal Company. The Federal Coal Company, the purchaser, was a corporation chartered and organized under the laws of the State of Delaware, with coal mines and offices in the state of Kentucky, and with an office at Chattanooga, Tennessee.

The Federal Coal Company ordered out, and Flanagan shipped, 73 cars of this coal, but failed to order out, and declined to accept, 127 cars of the coal.

Beginning in October, the price of coal declined rapidly, until in December the price was only about \$2.00 per ton. Flanagan demanded of the coal company that it accept the balance of the coal and give shipping instructions for the shipment of same, which the coal company declined to do.

On May 6, 1921, petitioner Flanagan brought suit in the Chancery Court of Chattanooga, Tennessee, against the said Federal Coal Company to recover the damages which he alleged he had

suffered on account of the failure of the Federal Coal Company to accept and pay for this coal as per its contract. (Record, pages 25 to 27.)

The defendant answered and denied that it had breached the contract and insisted that the complainant, Flanagan, had failed to pay the privilege tax required of coal dealers by Chapter 134 of the Public Acts of Tennessee of 1919. Other defenses were interposed which are not necessary to be mentioned. Upon the trial of the case the Chancellor held:

1. That complainant Flanagan had complied with all his obligations under the contract.

2. That defendant Federal Coal Company had breached its contract.

3. That Flanagan was not entitled to recover because he had failed to pay the privilege tax required of coal dealers under the Revenue Act of Tennessee, to be hereinafter fully set out, and that Flanagan was not engaged in interstate commerce in such a way as to excuse the payment of said tax. (Record, pages 22 to 25.)

From this decree petitioner Flanagan appealed to the Supreme Court of Tennessee and there insisted, by proper assignments of error, that he was not liable for the privilege tax, be-

cause the contract sued on was interstate commerce, in that the coal was sold by the said Flanagan to the Federal Coal Company to be delivered to purchasers from the said Federal Coal Company in other states, and hence the transaction was within the protection of the commerce clause of the Constitution of the United States.

The Supreme Court of Tennessee held that this was not interstate commerce, and affirmed the Chancellor's decree. (Record, page 244 et seq.)

On May 29, 1923, the said Flanagan filed a petition for certiorari in this court, which was granted by this court on November 19, 1923.

ASSIGNMENTS OF ERROR.

The Supreme Court of Tennessee erred in holding that petitioner Flanagan was barred from a recovery because he had failed to pay the privilege tax required of coal dealers in Tennessee. The coal was sold by the petitioner to the defendant, a foreign corporation, to be delivered to purchasers in states other than Tennessee, to whom the coal had been sold by the said Federal Coal Company. This was interstate commerce, and the dismissal of the petitioner's suit was a denial of his rights under the commerce clause of the Constitution of the United States. (Art. 1, Sec. 8, Clause 3.)

BRIEF AND ARGUMENT.

The undisputed proof shows that the petitioner, Flanagan, complied with the contract on his part, and that it was breached without excuse by the defendant, the Federal Coal Company. The two hundred cars of coal were to have been shipped fifty (50) cars per month, during the months of September, October, November and December. Flanagan delivered the coal as rapidly as he could get the defendant to receive it, until in December, 1920, the defendant definitely refused to take any more coal and finally breached the contract. (R., pp. 45, 46, 47, 119, 188, 189.) Flanagan shipped, and the Federal Coal Company received, seventy-three (73) cars. (R., p. 46.) E. R. Thompson, manager of the Federal Coal Company, admits that the defendant declined to take the coal, its excuse being that the price went down, and the purchasers to whom it had sold the coal failed to take same. (R., pp. 34, 35, 226.) The price of coal rapidly declined, until at the time of the final breach it was worth on the market only Two (\$2.00) Dollars per ton, and the petitioner, Flanagan, suffered the full amount of the damages sued for.

As stated, both the Chancery Court at Chattanooga and the Supreme Court of Tennessee found these facts to be true, and petitioner was

denied relief solely because he had failed to pay the privilege tax alleged to have been required by the law of Tennessee, covering the period when the balance of the coal should have been delivered. The statute in question is contained in the general Revenue Bill, passed by the General Assembly of Tennessee in 1919, Chapter 134, Section 4, and provides as follows:

X | *"Be it further enacted, That each vocation, occupation and business hereinafter named in this section is hereby declared to be a privilege and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the County Court Clerk as provided by law for the collection of revenue."*

The coal dealers embraced by this Act are described as follows:

"Persons, firms or corporations engaged in buying, selling, or dealing in coal or coke in carload lots."

Section 16 of this act provides as follows:

"Be it further enacted, That it is hereby a misdemeanor for exercising any of the foregoing privileges without first paying the taxes prescribed for the exercise of the same, and all parties so offending shall be

liable to a fine of not less than \$10.00 nor more than \$50.00 for each day such privilege is exercised without license, but this inhibition shall not apply to any person, firm or corporation engaged in interstate commerce."

On June 18, 1920, petitioner Flanagan paid the tax required by this act in the trade name of "Cumberland Mountain Coal Company." This payment covered the period from June 18, 1920, to September 18, 1920. (R., p. 232.) This privilege tax was, therefore, paid at the time the contract between Flanagan and the Federal Coal Company was entered into on August 19, 1920. It was paid when a part of the coal was delivered, but the privilege had expired at the time the contract was breached.

THE TRANSACTION WAS INTER- STATE COMMERCE.

This contract was between citizens of different States for the sale of coal to be delivered in other States. Flanagan was a citizen of Grundy County, Tennessee; he owned a small mine of his own, which he operated under the name of "The Cumberland Coal Company." (R., p. 70.) He owned all the stock in the Campbell Branch Coal Company, which he operated. (R., p. 69-70.) He also had a lease on the output of the Tracy

City Coal Company, and also had contracts for a large part of the output of the Staub Coal Company. (R., pp. 237,238-239, and 67-68.) He purchased coal from various other parties. It is obvious that he had enough coal of his own to have completely filled the contract with the Federal Coal Company. Besides the coal delivered to the Federal Coal Company, Flanagan sold coal to various other parties, some of whom were residents of Tennessee. Whether this coal which was sold to residents of Tennessee was sold for delivery outside of the State does not appear, is not material, and has no connection whatever with the contract in question. (R., pp. 251-252.) All the coal delivered to the Federal Coal Company by Flanagan under this contract was delivered, and was intended to be delivered, to purchasers of the Federal Coal Company outside of Tennessee. (R., pp. 233-234-235.)

The Federal Coal Company was a Delaware corporation with large mines situated in the State of Kentucky, and with offices in the State of Kentucky and at Chattanooga, Tennessee. In addition to the coal it mined in Kentucky, the Federal Coal Company frequently bought coal as a broker, but none of this coal was bought for sale in Tennessee.

The Federal Coal Company did not pay this privilege tax required by the statute of Tennes-

see, and could not legally have bought and sold coal in Tennessee for delivery in this State. (R., 82.) The coal sold by Flanagan to the Federal Coal Company was for delivery in other States to customers to whom that Company had already contracted to deliver the coal. This is shown by the testimony of the manager, E. R. Thompson. (R., pp. 78-79-80-164.)

Aside from the fact that the Federal Coal Company had no license and could not lawfully sell coal in Tennessee that was purchased in this State, Thompson explains that the Company had business reasons for not selling this coal in Tennessee. (R., p. 164.) Both of the parties understood this at the time the contract was made. Prior to the time this contract was made the Federal Coal Company had purchased coal from the Tracy City Coal Company, of which Flanagan was an officer, and all this coal had been shipped to South Carolina for export, and to purchasers in the State of Georgia. (R., 141.)

The method of handling this coal is explained in the stipulation of counsel as follows:

"It is further agreed that all the coal shipped on the order of Federal Coal Company, under said contract sued on was shipped in the name of Federal Coal Company—i. e., the bills of lading were taken from the railroad company at Tracy City,

Tennessee, by said Flanagan, or the mines, in the name of the Federal Coal Company as shippers, the coal being consigned according to orders theretofore given by said Federal Coal Company." (R., p. 252.)

So that the very act of delivering this coal was to place it in interstate commerce. The manner in which shipping orders were issued is shown by one of the orders filed in the record at page 236.

As we have explained, the Federal Coal Company consumed no coal and kept none in stock. Its purchases were all for resale, and the deliveries were not made to it, but to the purchasers from it. This is explained by the testimony of Mr. Thompson, the manager of the Federal Coal Company, as follows:

"Q. 17. What is their practice with respect to buying and selling; that is, do they buy in stock, or do they buy and sell usually so that the car will move from their purchaser to their customer?

A. In most cases it moves direct from the person from whom they buy it to the person to whom they sell it; *they never stock it, because that would involve handling charges. It is always continuous moving from the mine to destination; if it is halted*

anywhere it is halted in the car and held by the Railroad Company." (R., 175-176.)

The Federal Coal Company had already contracted to sell this coal to purchasers in other States before it made its contract with Flanagan. Mr. Thompson, the manager of the Company, testified:

"A. We made a trade with Mr. Flanagan to take a certain amount of coal from him. *We had it sold to other parties.* For some reason they could not, or would not, take the coal; when they didn't we would not take it.

Q. 24. Why didn't you take it?

A. Because our customers would not take it from us." (R., p. 226.)

The Federal Coal Company is now suing these purchasers for failing to take this coal. (R., pp. 78-79-80.)

The general manager of the Federal Coal Company in his testimony makes it clear that that Company only buys coal to supply the existing demands of its customers when the supply from its mines is inadequate. These customers were all outside of Tennessee, and, as shown, the purchase from Flanagan was made for the purpose of filling existing contracts with these non-resident purchasers.

As we have shown, the *contract* in this case violated no law for two reasons:

(a) At the time the contract was made the parties understood that the coal was for interstate shipment.

(b) At the time the contract was made Flanagan had paid the privilege tax in question.

In *delivering* the coal to the Federal Coal Company, Flanagan violated no law of the State of Tennessee, because the coal was all shipped to purchasers in other States.

Flanagan did not violate the law of Tennessee in failing to again pay this privilege tax on September 18, because at that time the shipments that he had made to the Federal Coal Company were all to purchasers in other States, and the course of dealing had fully demonstrated the fact that this was purely an interstate commerce transaction.

At the time of the *final breach* of the contract in December, 1920, petitioner Flanagan had violated no law of the State of Tennessee in failing to pay the tax, because all the coal that he had delivered under this contract had been shipped in interstate commerce to purchasers in other States. (R., pp. 233-234-235.)

It is therefore clear that the law of Tennessee was not violated by the petitioner, Flanagan—either *in making the contract* with Federal Coal Company or in *executing* the contract up to the time it was breached.

The opinion of the Chancellor, which was adopted by the Supreme Court of Tennessee, states the position of those courts as follows:

“But the statute did not impose any tax upon *the mere sale* of the coal. Had this been Flanagan’s coal he would not have been liable to the tax, no matter where or to whom he sold it. The thing that is taxed is the privilege of dealing in coal. What made him liable to the tax was the fact that he was engaged *in buying coal to sell again*. Not having paid the tax and obtained a license to do that business, he cannot recover upon any contract for the sale of coal so bought.” (R., p. 246.) (Italics ours.)

It must be borne in mind that at the time Flanagan’s license expired, on September 18, he had already contracted for sufficient coal to have more than filled this contract, and further that a large part of the contract could have been filled from his own mines. But, even assuming that he had to purchase on the market as a broker the coal with which to fill this contract, the po-

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sition of the Supreme Court of Tennessee is not tenable. As stated by that court, the mere sale of an article would not impose liability for this tax. In other words, the *mere purchase* by Flanagan of coal without a sale of it would not subject him to liability for the tax. It was both the buying and selling which made him a dealer and liable for the tax. (17 C. J., 1154.) Therefore, as the sale was an essential part of the dealing which imposed liability for the tax, and that sale was for interstate shipment, necessarily the transaction was one of interstate commerce.

The question at last is this:

Could the State of Tennessee have legally prevented Flanagan from completing this contract and delivering this coal by shipping same to the customers of the Federal Coal Company in other states?

Would not a tax upon the act of delivering this coal be a direct burden upon interstate commerce?

Assuming that Flanagan purchased this coal as he delivered it, and purchased it for the purpose of delivering it, it was none the less interstate commerce. His purchases were made in carload lots, and when the coal was delivered, bills of lading were taken out in the name of the

Federal Coal Company, the coal being consigned to that Company's customers in other States. The delivery to Flanagan was, in itself, a delivery to the Federal Coal Company's consignee. The very fact of delivering placed the coal in interstate commerce. (R., p. 252.)

That such a purchase in one State for delivery in another State is interstate commerce has been conclusively settled by the repeated decisions of this court.

In *Lemke vs. Farmers Grain Company*, 259 U. S., p. 50, the direct question was considered and settled. In that case certain elevator companies in the State of North Dakota were engaged in purchasing wheat from farmers in that State, and storing same in elevators for the purpose of resale and shipment to other States. The court held that this was interstate commerce, and could not be burdened by inspection laws and other State regulations. Among other things, the Court say:

"That such course of dealing constitutes interstate commerce, there can be no question. This court has so held in many cases, and we have had occasion to discuss and decide the nature of such commerce in a case closely analogous in its facts, and altogether so in principle. *Dahnke-Walker Mill Co. vs. Bondurant*, decided December 12, 1921,

(257 U. S. 282, ante 239, 42 Sup. Ct. Rep. 106). In that case the facts disclose that a company organized in Tennessee, and carrying on business there, went into Kentucky, and, through an agent there, bought wheat for shipment to the company's mill in Tennessee. The State Court held that the transaction was merely a purchase of wheat in Kentucky, and made the Tennessee company amenable to the regulatory statutes of the State. This court rejected the conclusion of the State Court, *and held that the buying, no less than the selling, of grain, under such circumstances, was a part of interstate commerce*, committed to national control by the Federal Constitution. Applying the principle of that decision, and the previous decisions of this court, cited in the opinion, the complainant's course of dealing in the buying of grain, which it purchased and sold under the circumstances as herein disclosed, was interstate commerce. Being such, the State could not regulate the business by a statute which had the effect to control and burden interstate commerce.

"Nor is this conclusion opposed by cases decided in this court and relied upon by appellates, in which we have had occasion to define the line between State and Federal authority under facts presented, which required a definition of interstate commerce,

where the right of state taxation was involved, or manufacture or commerce of an intrastate character was the subject of consideration. In those cases we have decided the beginning of intrastate commerce as that time when goods begin their intrastate journey by delivery to a carrier or otherwise, thus passing beyond State authority into the domain of Federal control. Cases of that type are not in conflict with principles recognized as controlling here. None of them indicates, much less decides, that interstate commerce does not include *the buying and selling of products for shipment beyond State lines*. It is true, as appellants contend, that after the wheat was delivered at complainant's elevator, or loaded on the cars for shipment, it might have been diverted to a local market or sent to a local mill. But such was not the course of business. The testimony shows that practically all the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market. That was the course of business, and fixed and determined the interstate character of the transaction." (Italics are ours.)

It must be remembered that the very thing the State of North Dakota was attempting to burden was the purchase by the elevator compa-

nies from farmers in the State of North Dakota. In that case the elevators stored the wheat after the domestic purchases, and the contracts for sales were made thereafter. Yet, because the uniform course of dealing had established the fact that the wheat so purchased and stored was all shipped out of the State the court held the purchases for storage were a part of interstate commerce transactions.

In *Dahnke Milling Company vs. Bondurant*, supra, the court say:

"Where goods in one State are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of goods after they reach their destination, and while they are in the original packages. (*Brown vs. Maryland*, 12 Wheat. 419, 446, 447, 6 L. Ed. 678, 688, 689; *American Steel & Wire Co. vs. Speed*, 192 U. S. 500, 519, 48 L. Ed. 538, 546, 24 Sup. St. Rep. 365.) On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. (*American Express Co. vs. Iowa*, 196 U. S. 133, 143, 49 L. Ed. 417, 422, 25 Sup. Ct. Rep. 182.) This has been recognized in many decisions, construing the commerce

clause. Thus it was said in *Welton vs. Missouri*, 91 U. S. 275, 280, 23 L. Ed. 347, 349: 'Commerce' is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities. In *Kidd vs. Pearson*, 128 U. S. 1, 20, 32 L. Ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, it was tersely said: Buying and selling and the transportation incidental thereto constitute commerce. In *United States vs. E. C. Knight Co.*, 156 U. S. 1, 13, 39 L. Ed. 325, 329, 15 Sup. Ct. Rep. 249, contracts to buy, sell, or exchange goods to be transported among the several States were declared part of interstate trade or commerce. And in *Addyston Pipe & Steel Co. vs. United States*, 175 U. S. 211, 241, 44 L. Ed. 136, 147, 20 Sup. Ct. Rep. 96, the court referred to the prior decisions as establishing that 'interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities.' In no case has the court made any distinction between buying and selling, or between buying for transportation to another State and transporting for

sale in another State. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling, it was not material whether it came first or last."

This question was again conclusively settled by this court in the case of A. G. Spalding vs. Wm. H. Edwards, published in the Advanced Opinions of May 15, 1923, at page 539. In that case Scholtz & Co., brokers in New York, purchased goods of Spalding & Co., in New York, for the purpose of shipping same to a firm in Venezuela. The court held that the purchase by Scholtz & Co. from Spalding for the purpose of filling this order was foreign commerce and could not be taxed. Among other things, the court say:

"The very act that passed the title, and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export, and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port. The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result. Getting the bill of lading stands no

differently from putting the goods on board ship. Neither does it matter that the title was in Scholtz & Co., and that, *theoretically, they might change their mind and retain the bats and balls for their own use.*" (Italics ours.)

The court in that case cited as applicable the cases of Railroad Commission vs. Texas & P. R. Company, 229 U. S., page 336; Texas & N. O. R. Company vs. Sabine Tram Company, 227 U. S., page 111, in which cases it is held that freight purchased in a State and shipped on local bills of lading to another point in that State, which was intended for reshipment to foreign ports, was interstate commerce and subject to the rate fixed by the Interstate Commerce Commission on through shipment although it was billed to the purchaser at a point within the State and might have been diverted, or kept within the State, if the purchaser had desired. This court has held in several cases that cattle or wheat purchased within a state for reshipment out of the state by members of Boards of Trade and in stockyard dealings are subject to Federal regulation as interstate commerce. Board of Trade vs. Olsen, 262 U. S., 1; Stafford vs. Wallace, 258 U. S., 495; Swift & Company vs. United States, 196 U. S., 375.

This court has held in several cases that the

purchase, accumulation and piping of oil in pipe lines within a state is interstate commerce, and free from state taxation, when this oil is intended for transmission into other states.. Eureka Pipe Line vs. Walter S. Hallanan, 257 U. S., 265; U. S. Fuel Gas Company vs. Hallanan, 257 U. S., 277; Pennsylvania vs. West Virginia, 262 U. S., 553.

In the case of Heyman vs. Hays, 236 U. S., 176 this court reversed the decision of the supreme court of Tennessee with reference to the liability of liquor dealers at Chattanooga for the Tennessee privilege tax. These dealers were engaged in procuring and storing liquor and shipping same to purchasers in other states. The privilege tax was assessed against these liquor men as "dealers." This court held their business was interstate commerce, and was not subject to state taxation.

We submit that the principles announced in that case, and in the other cases herein cited, are conclusive of the questions involved in the case at bar.

PETITIONER IS JUSTLY ENTITLED TO A RECOVERY

The undisputed proof shows that after the contract was entered into petitioner Flanagan delivered all the coal that the defendant would

permit him to deliver, and that he, Flanagan, tendered the coal and did everything possible to induce the defendant to accept the balance, but after the price of the coal declined the defendant refused to accept the coal and breached its contract.

The proof shows that the difference between the contract price and the market price at the dates on which the defendant should have accepted the coal was approximately \$28,000; the difference between the contract price and the market price at the date of the final breach was approximately \$40,000. We assume, however, that the amount of petitioner's recovery will have to be ascertained by a proper reference after the case is remanded to the Tennessee courts.

THE BATES CASE

Inasmuch as adversary counsel have insisted that the record in the case of the Federal Coal Company vs. W. S. Bates and Tracy City Coal Company be incorporated in the transcript in this court, we assume they will rely upon that record, and for that reason we deem it proper to make a statement with reference to that litigation, which we shall hereafter refer to as the *Bates* case as distinguished from the case at bar, which we refer to as the *Flanagan* case.

It appears that some time prior to April 7th,

1920, the Tracy City Coal Company entered into a contract to sell to the Chattanooga Coal Company (owned by W. S. Bates) eighteen thousand tons of coal, to be delivered eight cars per week from April 12th, 1920, to April 12th, 1921 (R. p. 5.). Later, this contract was assigned by the said Bates to the Federal Coal Company. (R. p. 2.)

Petitioner Flanagan was a stockholder in the Tracy City Coal Company, and had leased its mines covering the period in controversy. At the time the contract sued on in this case (Flanagan vs. Federal Coal Company) was entered into between Petitioner Flanagan and the Federal Coal Company, it appears that the Bates contract had not been complied with and very little coal had been delivered under it. It further appears that when this contract was entered into between Flanagan and the Federal Coal Company on August 19th, 1920, upon which this suit is predicated, the parties thereto agreed to cancel the Bates contract and the Federal Coal Company agreed to release the Tracy City Coal Company from liability thereunder. The Flanagan contract contains this clause:

"In consideration of this sale by party of first part and faithful performance of this contract, party of the second part agrees to release the Tracy City Coal Com-

pany from all liability under contract made about April 1st, 1920, between the Tracy City Coal Company and the Chattanooga Coal Company, which contract was assigned by the Chattanooga Coal Company to Federal Coal Company on the 7th day of April, 1920." (*Record, page 28.*)

Notwithstanding this agreement, the Federal Coal Company, after Petitioner Flanagan began his suit, filed a bill in the Chancery Court at Chattanooga against the said Bates and the Tracy City Coal Company on August 24th, 1921, seeking to recover for the breach of the Bates contract. (R. p. 1-6.)

Later, that bill was amended and Flanagan was made a defendant. In the amended bill it was charged that the cancellation of the Bates contract was without consideration and was procured by fraud. It was further alleged that Flanagan, as the lessee of the Tracy City Coal Company, was liable for the breach of that contract. (R. p. 9-12.)

Later, the Federal Coal Company elected to dismiss the Bates suit *as against Flanagan*, and sought to hold only the Tracy City Coal Company for the alleged breach complained of. (R. p. 15.)

While Flanagan was not a party to that case,

after this dismissal was entered, the two cases were heard together as a matter of convenience, the same proof being used by agreement in both cases. Both the chancellor and the supreme court held there was no proof whatever of any fraud in the cancellation of the Bates contract, and that the agreement to cancel was made for a valuable consideration (*R. p. 224-250*), and the Bates case was of course dismissed.

It will be noticed that in the opinions delivered, both the chancellor and the supreme court dealt with the two cases separately. Near the conclusion of the opinion of the Supreme Court in the Bates case, however, the following statement appears:

"In our opinion, the decree of the Chancellor meets the equity of these causes, and taking the record as a whole, we are of the opinion that from a standpoint of justice neither party is entitled to recover from the other. Each flagrantly violated its contract, and the loss in one cause should, in fairness, be offset against the loss in the other." (*R. p. 250.*)

This statement is purely dictum, and should not in any manner prejudice Petitioner Flanagan's rights in his case. It must be borne in mind that the contract sued on in the Bates case was cancelled for a valuable consideration, and

all rights under same waived, in a contract entered into in good faith and without fraud, as found by both the chancellor and the supreme court.

In other words, the Bates contract was *cancelled* at the same time the Flanagan contract was *executed*.

The Federal Coal Company waived its claim for damages under the Bates contract in order to procure the execution of the Flanagan contract. The Bates case was voluntarily dismissed against Flanagan; no recovery was sought against him. He was not a party to that litigation and his rights cannot be prejudiced by the dictum above quoted.

The bill in the Bates case was not dismissed because of any supposed equities between the parties, but that bill was dismissed because the court found as a fact that the Bates contract was voluntarily cancelled without fraud and for a valuable consideration. Therefore, there could not, of course, be a right of recovery for a breach of that *cancelled* contract.

THE FEDERAL COAL CO. ASSERTING RIGHTS UNDER THE FLANAGAN CONTRACT.

The Federal Coal Company not only breached .

the Flanagan contract without a legal excuse after having received the benefit of it as long as the prices of coal made it a favorable contract, but it continues to assert all its rights by virtue of having contracted for this coal.

The Federal Coal Company purchased this coal from Flanagan in order to fill contracts it had with purchasers in other states. When the price of coal went down, these purchasers in other states breached their contracts with the Federal Coal Company and failed to take the coal. Notwithstanding its breach of the Flanagan contract, the Federal Coal Company is now suing these purchasers to whom it had contracted this coal, on account of their failure to take from it the coal it had contracted to take from Flanagan.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1923

No.  75

JOHN D. FLANAGAN, Petitioner

VS.

FEDERAL COAL COMPANY.

REPLY BRIEF AND ARGUMENT FOR
DEFENDANT.

CHAS. C. MOORE,
Counsel for Defendant.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

No. 346.

JOHN D. FLANAGAN, Petitioner

vs.

FEDERAL COAL COMPANY.

REPLY BRIEF FOR
THE FEDERAL COAL COMPANY.

STATEMENT OF THE CASE.

This case should not be in this court for two reasons:

(a) No notice of the date of the submission of the petition for certiorari was given as required by Sections 3 and 4 of Rule 37 of this court.

(b) The judgment of the State Supreme Court of Tennessee was rested upon other grounds broad enough to maintain the judgment independent of the Federal question sought to be made here.

(a) Petition for certiorari was filed in this Court on May 29, 1923. It was not submitted within the time required by Section 4 of Rule 37, because petitioner failed to have his record printed in time for submission. Counsel for this defendant consented to an extension of time for printing the record and submitting the case, expecting to receive copy of the printed record and brief with notice of the date of submission. Neither were received. The order granting the certiorari recites that it was granted upon the consideration of the petition and "Upon the argument of counsel thereupon had" (R. 254) Counsel for this defendant had no notice of any hearing and no opportunity to present arguments.

(b) If the defendant had been given notice of the submission of petition with opportunity to be heard in opposition thereto, it would have shown that this Court is without jurisdiction because the Federal question sought to be made was not the determinative question in the State Court's decision.

These consolidated causes were in effect an action and a cross-action between John D. Flanagan and the Federal Coal Company as principal parties at interest. The dealings between these parties had their origin in a contract dated April 7, 1920, entered into nominally between the Tracy City Coal Company and W. S. Bates. Both the State Chancery Court (R. 19) and the State Supreme Court (R. 247) found that in the making of that contract John D. Flanagan was the undisclosed principal for whom the name of the Tracy City Coal Company was used, and W. S. Bates was buying the coal for the Federal Coal Company. Bates at once assigned the contract

to the Federal Coal Company (R. 2). By this contract petitioner Flanagan as undisclosed principal engaged to deliver 18,000 tons of coal at the price of \$3.90 per ton, f. o. b. cars Tracy City, Tennessee. By July 1920, this coal had advanced to \$10.00 per ton, and no coal was being shipped under the contract (R. 247). From the time of the last shipment under this contract on May 25th (R. 208) until August 19th when Flanagan entered into a second contract sued on herein to sell the same coal to the Federal Coal Company direct at the price of \$9.00 per ton, he did not tell the Federal Coal Company, or any of its representatives, that the duty and obligation to ship and deliver the 18,000 tons of coal under the first contract of April 7th rested on him. On the contrary, always in conversation with the Federal Coal Company representatives, he referred to that contract as the obligation of the Tracy City Coal Company which did not rest upon him at all (R. 212). The fact that he made a second contract to sell at \$9.00 per ton the same coal that he was already bound to deliver under the first contract at \$3.90 per ton, and concealed the fact that he was so bound was relied upon by the Federal Coal Company as a fraud vitiating the second contract. Moreover, the Federal Coal Company insisted that there was no consideration for the second contract, because it only bound Flanagan to deliver the same coal that he was already bound to deliver under the first contract.

This statement of the undisputed facts shows that the Chancellor and the State Supreme Court reached the end of substantial justice. In affirming the decree of the Chancellor, denying the recovery to either of the parties, the State Supreme Court said:

“In our opinion the decree of the Chancellor meets the equity of these causes, and taking the record as a whole, we are of the opinion that from a standpoint of justice, neither party is entitled to recover from the other. Each flagrantly violated its contract, and the loss in one case should in fairness be offset against the loss in the other.” (R. 250.)

A thoughtful reading of the entire opinion of the Tennessee Supreme Court deciding these consolidated causes (R. 244-250) compels the conclusion that the above quoted concluding paragraph of the opinion is the essence of the decision. In the opinion of that Court neither of the parties was entitled to recover against the other and the questions made were so decided as to reach that result.

Petitioner Flanagan admits in his testimony (R. 212) that he concealed from the Federal Coal Company the fact that he was bound as principal under the first contract. He procured the second contract to sell the same coal at an advanced price by this concealment. The reasoning of the State Court to the conclusion that this was not such fraud as vitiated the second contract is not to my mind altogether satisfactory. Neither is it clearly seen what consideration supports the second contract sued on by Flanagan.

But the Court reached the conclusion upon the whole case that “Neither party is entitled to recover from the other.”

Having reached this conclusion, the incidental rulings upon the question of fraud, and want of consideration on

the one hand, and, upon the question of failure of Flanagan to pay his privilege taxes upon the other, were but steps in reaching the result which in the opinion of the Court, the justice of the case required.

"It is settled law that where the record discloses that the judgment of the State Court was based not alone upon a ground involving a Federal question, but also upon another and independent ground broad enough to maintain the judgment, this Court will not take jurisdiction to review such judgment, and will dismiss a writ of error brought for that purpose." *New York ex rel vs. Atwell*, 261 U. S. 590, 67 Law Ed. 814; *Egan vs. Hart*, 155 U. S. 189, 41 Law Ed. 680.

Adversary brief (pp. 25-27) seeks to escape the application of the above quoted rule by the statement that the suit of the Federal Coal Company against the Tracy City Coal Company and petitioner, Flanagan, for breach of the first contract, was dismissed in the lower court as to Flanagan, that he was not a party to that cause in the Appellate Court and that the quoted ruling of that Court was dictum as to him. Record 15 is cited to support the statement.

The order cited sustained a motion of the petitioner Flanagan and the Tracy City Coal Company as joint defendants in that suit to require an election, because the suit was against Flanagan as undisclosed principal and the Tracy City Coal Company as agent. The order as entered shows an election to claim judgment against the Tracy City Coal Company, but does not dismiss the suit as to petitioner Flanagan. Moreover, this cause had been previously consolidated with the suit of Flanagan against

the Federal Coal Company. It then stood as one cause and was so heard and determined (R. 250). Clearly the State Supreme Court regarded Flanagan as a party when it ruled, "We are of the opinion that from a standpoint of justice, neither is entitled to recover from the other." That is a question of local practice on which the judgment of that Court is conclusive.

THE MERITS.

Petitioner Flanagan in April, 1920 (R. 247) began to buy, sell and deal in coal generally at Tracy City, in Grundy County, Tennessee, and on June 18, 1920, paid a privilege tax to the State of Tennessee and Grundy County, and took out license for three months "To exercise the privilege of dealing in coal and coke in Grundy County," which license expired September 18, 1920 (R. 232). He continued this business of buying and selling coal until the close of December, 1920, without paying additional tax. All of the coal was purchased by him from different mines f. o. b. cars Tracy City, Tennessee, and was sold and delivered each day f. o. b. cars Tracy City as he bought it (R. 251).

Adversary brief (p. 8) makes the statement that petitioner Flanagan had and was producing enough coal of his own to fill the contract in suit. The State Chancery Court found the fact to be (R. 23) that he handled very little if any coal of his own production and not anything like enough to fill this contract. The State Supreme Court found the facts in this connection as follows:

"The record of his (Flanagan's) transactions which he files here shows that all the coal which

he sold during this period he purchased from some other person or corporation, and all the coal which he delivered to the Federal Coal Company he bought from the Campbell Branch Coal Co., and probably owned all of its stock. Nevertheless, it was the legal entity which operated the Tracy City mines and sold the coal to him. This was more than a merely legal conception. It had a practical effect. The price at which the corporation sold the coal to him was less than the price at which he sold it to the Federal Coal Company, and the royalty paid to the Tracy City Coal Company was computed on the price which he credited to the Campbell Branch Coal Company. He, himself, calls the difference his commission or brokerage charge. He cannot get away from the fact, and should not be allowed to get away from the fact, that in this transaction he was a dealer in coal." (R. 245.)

The second contract in suit of August 19, 1920, recites that it is "By and between John D. Flanagan of Tracy City, Tennessee, party of the first part, and the Federal Coal Company, a corporation of Chattanooga, Tennessee, party of the second part." It provides that the coal sold was to be "Tracy City run of mine," delivery at the rate of fifty cars per month between September 1st and December 31, 1920. It further provides, "This sale is made f.o. b. cars mines and railroad weights are to govern all settlements." (R. 27-28). By this contract petitioner Flanagan recognized himself as bound to ship the coal upon the orders of the Federal Coal Company to any consignee that they might direct (R. 45), and he charges in his pleading (R. 26) that he could not ship the coal because defendant would not give him shipping instructions.

The Federal Coal Company had contracted to deliver coal to customers outside of Tennessee, and it contracted for the coal from petitioner Flanagan intending at the time to ship it to its customers outside the state. All that was shipped went to these customers. It failed to take part of the coal because its customers breached their contracts and refused to receive it.

Undoubtedly, the Federal Coal Company in buying this coal was engaged in interstate commerce. From this premise adversary brief argues that since the purchaser was engaged in interstate commerce, in making the purchase, the seller was so engaged in making the sale. This conclusion, I submit, does not necessarily follow.

If the sale and delivery of the coal by Flanagan was for that reason interstate commerce, then its purchase by him must for the same reason be interstate commerce, because he could not sell and deliver it without first buying it. By the same reasoning the mine operator in selling to him, in mining the coal and employing miners for this purpose was engaged in interstate commerce, because each was an essential prerequisite of the other.

Even adversary counsel will not insist that all the persons in this chain of causation were engaged in interstate commerce merely because the purchaser from petitioner Flanagan intended to export the coal.

The Tennessee Supreme Court in construing and applying this local revenue statute in this case has said that the tax is levied not upon the sale but upon the business of dealing, which embraces both buying and selling.

The Court ruled that Flanagan might sell coal produced by him without paying the tax. He became subject to the tax, not because he made this sale to the Federal Coal Company, but because he engaged in the business of buying and selling coal. While paying the tax, petitioner Flanagan had the right to sell and did sell coal to local users. The sale of a part of it to the Federal Coal Company which it shipped out of the state was only an incident of the local business being conducted. The tax is not levied upon the sale for foreign shipment. Even if petitioner Flanagan had engaged exclusively in selling to foreign customers, he would have been charged no higher tax than a competitor engaged exclusively in selling to local customers. There was no discrimination.

The clear distinction between the power of a state to impose a privilege tax upon a business which deals in articles of interstate commerce and the power of the state to tax the commerce itself was made by this Court in the early case of *Nathan vs. Louisiana*, 8th Howard 73, 12th Law Ed. 993. The State of Louisiana had imposed a privilege tax upon the business of money and exchange broker. The plaintiff Nathan handled bills of exchange for residents of Louisiana and sold them to purchasers outside the state of Louisiana. For that reason, he insisted that he was not subject to the tax. In overruling that contention, the Court said:

“This is not a tax on bills of exchange. Under the law, every person is free to buy or sell bills of exchange, as may be necessary in his business transactions; but he is required to pay the tax if he engage in the business of a money or an exchange broker.

“The right of a state to tax its own citizens for the prosecution of any particular business, or profession, within the state, has not been doubted. And we find that in every state money or exchange brokers, venders of merchandise of our own or foreign manufacture, retailers of ardent spirits, tavern keepers, auctioneers, those who practice the learned professions, and every description of property, not exempted by law are taxed.

“As an exchange broker, the defendant had a right to deal in every description of paper and in every kind of money; but it seems his business was limited to foreign bills of exchange. Money is admitted to be an instrument of commerce, and so is a bill of exchange; and upon this ground it is insisted that a tax upon an exchange broker is a tax upon the instruments of commerce.

“What is there in the products of agriculture, of mechanical ingenuity, of manufacturers, which may not become the means of commerce? And is the vender of these products exempted from state taxation, because they may be thus used? Is a tax upon a ship, as property, which is admitted to be an instrument of commerce, prohibited to a State? May it not tax the business of ship building, the same as the exercise of any other mechanical art? And also the traffic of ship chandlers, and others, who furnish the cargo of the ship and the necessary supplies? There can be but one answer to these questions. No one can claim an exemption from a general tax on his business, within the state, on the ground that the products sold may be used in commerce.


“No State can tax an export or an import as such, except under the limitations of the Constitution. But, before the article becomes an export, or after it ceases to be an import, by being mingled

with other property in the State, it is a subject of taxation by the State. A cotton broker may be required to pay a tax upon his business, or by way of license, although he may buy and sell cotton for foreign exportation. * * *

“Now, the individual who uses his money and credit in buying and selling bills of exchange, and who thereby realizes a profit, may be taxed by a state in proportion to his income, as other persons are taxed, or in the form of a license. He is not engaged in commerce. He is less connected with it than the ship builder, without whose labor foreign commerce could not be carried on.”

The ruling in the above quoted case that “No one can claim an exemption from a general tax on his business within the State on the ground that the products sold may be used in commerce,” has been followed and approved in numerous decisions of this Court and of the various circuit and State courts.

Kirtland vs. Hotchkiss, 100 U. S. 490, 25 L. Ed. 562;
Van Brockland vs. Tennessee, 117 U. S. 176, 29 L. Ed. 854;
Hall vs. Virginia, 8th Wallace 184, 19 L. Ed. 361;
State Tonnage Tax Cases, 12th Wallace 213, 20 L. Ed. 373;
Ward vs. Maryland, 12th Wallace 428, 20 L. Ed. 452;
Walling vs. Michigan, 116th U. S. 460, 29 L. Ed. 696;
Brown vs. Maryland, 12th Wheaton 444, 6 L. Ed. 687;
Pierce vs. New Hampshire, 46th U. S. 593, 12 L. 296;
Machine Co. vs. Gage, 100th U. S. 676, 25 L. Ed. 754;
Osborne vs. Mobile, 44th Ala. 499;



People vs. Coleman, 4th California, 58;
Wiggins Ferry Co. vs. East St. Louis, 102 Ill. 572;
New Orleans vs. Eclipse Towboat Co., 33 La. 648;
Corson vs. Maryland, 57th Md., 266;
State vs. Applegarth, 81st Md., 305, 28 L. R. A. 816;
State vs. Walton, 55th Mo. 291;
State vs. Harrington, 68th Vermont, 628.
Insurance Co. vs. Commonwealth, 87th Pa. State
 183;
Western Union Tel. Co. vs. Richmond, 26th Gratt,
 23.

In *Transportation vs. Wheeling*, 99th U. S. 279, 25th L. Ed. 414, the Court rules that it is within the power of a State to levy an ad valorem property tax against the resident owner of a vessel although engaged exclusively in interstate commerce.

In *Howe Machine Co. vs. Gage*, 100th U. S. 679, 25th L. Ed. 754, this Court held valid a statute of Tennessee imposing a privilege tax upon peddlers of sewing machines, which applied alike to machines made within the State and those made out of the State.

In *Woodruff vs. Parham*, 8th Wallace, 123, this Court held valid a privilege tax upon auctioneers imposed by a State upon auction sales alike of goods which were the products of the State as well as those which were products of other States.

In *Walling vs. Michigan*, 116th U. S. 446, 29th L. Ed. 691, this Court again pointed the distinction between a non-discriminatory tax upon businesses or the sale of merchandise, and the tax which discriminated against such businesses, because of the importation of the pro-

ducts dealt in, holding the former valid and the latter invalid.

In *Cornell vs. Coyne*, 192 U. S. 418, 48 L. Ed. 504, this Court held that a privilege tax of \$400.00 per annum upon the business of manufacturing filled cheese and one cent per pound upon the cheese so manufactured was not a tax "On any article exported from any State" in the meaning of the fifth paragraph of Section 9, Article 1 of the Constitution. The determinative question in that case was whether the tax upon the business of manufacturing filled cheese measured in part by one cent per pound upon the amount produced was a tax or duty upon an export where the entire output of the factory was manufactured under a contract previously made for its sale and export from the State.

It was ruled that the purpose of the manufacturer to export the article being manufactured, and the fact that it had already been sold for export, did not make the tax imposed on the business a tax on the article.

In *Heisler vs. Thomas Collieries*, 260 U. S. 256, 67 L. Ed. 242, this Court held valid a tax imposed by the State of Pennsylvania upon Anthracite coal when prepared for shipment to market out of the State.

In *Coe vs. Errol*, 116 U. S. 517, 29 L. Ed. 715, the Court held that saw-logs cut in New Hampshire floated to the village of Errol, awaiting loading for shipment out of the State was subject to taxation and were not in interstate commerce.

In *Susquehanna Coal Company vs. South Amboy*, 228 U. S. 665, 57 L. Ed., 1015, the Court held that coal mined in Pennsylvania, shipped to and stored in New Jersey to be ready to fill orders that might be received from other States was subject to taxation in New Jersey.

These cases were dealing with the tax levied directly up the property itself, and the question was whether or not the property at the time was in interstate commerce or at rest as a part of the local property of the State. They but illustrate conditions under which property at rest is subject to local taxation, and are authority for the proposition that the coal which petitioner Flanagan was selling to the Federal Coal Company was subject to taxation in his hands up to the moment title passed out of him.

Adversary brief (p. 14) states that the ultimate question is the power of the State to levy a tax upon the act of delivering the coal or to prohibit its delivery. On the contrary, we have seen that the Supreme Court of Tennessee in line with other courts upon the same subject ruled that this is not a tax upon the sale or delivery of the coal, but upon the business of dealing in coal.

Adversary brief relies upon authorities which I submit with greatest respect, does not sustain adversary contention.

Lemke vs. Farmers Grain Co., 258 U. S. 50 (erroneously cited as 259 U. S.) rules that contracts for the purchase of grain in North Dakota to be shipped to other states is a necessary part of interstate commerce.

Dahnke-Walker Mill Co. vs. Bondurant, 257 U. S. 282, holds that a purchase of wheat in Kentucky to be shipped in Tennessee is interstate commerce.

These cases are authority for the proposition that the Federal Coal Company was engaged in interstate commerce in buying the coal in question, but as pointed out above, it does not follow from that, that petitioner Flanagan was engaged in interstate commerce in making the sale.

Spaulding & Bros. vs. Edwards, 262 U. S. 66, 67 L. Ed. 865, rules that a direct tax levied by Congress upon baseball bats was not applicable to a shipment of such goods delivered on board ship for export to Venezuela. The tax upon the sale was in effect a tax or duty on the export and prohibited by Section 9, Article 1 of the Constitution. The question there considered was not analogous to the question in the instant case. There, the tax was levied directly upon the sale. It was in effect a tax upon the article sold because the tax must necessarily be added to the price.

In the instant case, the Tennessee Statute under consideration does not levy a tax upon the sale nor upon the article sold, but alone upon the privilege of engaging in a local business to which the sale to the Federal Coal Company was only incidental.

Railroad Commission vs. Texas & Pacific Railroad Co. 299 U. S. 336, is also relied upon in adversary brief. That case held void as a regulation of interstate commerce an order of the Railroad Commission of the State of Louisiana fixing interstate rates as applied to a shipment of

logs and staves from points in Louisiana to New Orleans for export to foreign countries.

The case of *Texas & New Orleans vs. Sabine Tram Co.*, 227 U. S. 111, relied on in adversary brief also ruled that a shipment of lumber from one point in Texas to another as part of an interstate trip was interstate commerce.

Each of those cases but apply the familiar rule that an article is in interstate commerce when it is started on an interstate trip; and, the fact is not changed by the form of bill of lading or the necessities for reloading or transfer to another carrier which the exigency of the interstate trip may require. Neither of these cases have any application here.

Board of Trade vs. Olsen, 262 U. S. 1, 67 L. Ed. 839, is also relied upon in adversary brief. That case holds that the stopping of an interstate shipment at Chicago for temporary purposes, and then continuing the shipment under the same contract of carriage does not take the grain out of interstate commerce. That case sustained the validity of the Grain Futures Act of Congress regulating interstate commerce in grain. Unquestionably, Congress had power to regulate interstate commerce in grain, and the determinative question was whether or not the temporary stopping of the grain in Chicago took it out of the interstate commerce. Having reached the conclusion that the stoppage in Chicago was temporary, and but an incident in the interstate trip, the power of Congress to regulate the dealing in the grain while on the trip or while temporarily stopped was unquestioned.

Stafford vs. Wallace, 258 U. S. 495, 66 L. Ed. 735, is also cited in adversary brief. The Act of Congress assailed in that case provided for the regulation of stock-yards and the business of packers done in interstate commerce, and empowered the Secretary of Agriculture to make certain investigations and rulings with respect thereto. The Secretary had promulgated a ruling respecting the stock yards at Chicago, and the question was whether or not these stock yards and the business of the packers affected by the order who were complainants in that cause were so directly connected with interstate commerce as to be a part of it within the power of Congress to regulate. The Court held from the facts that the stock yards in question were a necessary part of the commerce in stock; that it was the purpose of the Constitution to give to the Federal Congress full powers to regulate this commerce and that purpose would not be defeated by a technical inquiry into the non-interstate character of some of its necessary incidents and facilities when considered alone and without reference to their association and influence upon the stream of commerce flowing between the state. This case followed and approved a similar holding in *Swift & Co. vs. U. S.*, 196 U. S. 375, also cited in adversary brief.

These several cases are instructive as illustrations of what constitutes interstate commerce in modern business. The principles which control the decisions are time honored and sustained by a long line of holdings, but as pointed out in those cases, there is a wide difference between a sale by a single dealer in grain or a single dealer in live stock, and the organization of a grain exchange in Chicago controlling the movement in commerce of a large

part of the grain grown in this country or the organization of the stock yards in Chicago controlling the movement in commerce of a large part of the cattle and live stock in this country.

A single sale of two hundred cars of coal by petitioner Flanagan to the Federal Coal Company will have no effect upon interstate commerce, but if Flanagan had combined with all the other dealers of coal in the United States, and formulated with them rules and regulations to create a coal exchange to handle a large part of the coal produced in the country, then the combination so formed would operate directly on interstate commerce, and the power of Congress to regulate it would apply. Clearly, the ruling in the stock yards case, the grain futures case and the Swift & Company case has no bearing upon the question here under consideration.

The other cases relied upon in adversary brief of *Eureka Pipe Foundry Co. vs. Walter S. Hallanan*, 257 U. S. 265; *Fuel Gas Co. vs. Walter S. Hallanan*, 257 U. S. 277, and *Pennsylvania vs. West Virginia*, 262 U. S. 553, are likewise distinguishable from the case at bar upon similar grounds.

Adversary brief cites *Heyman vs. Hays*, 236 U. S. 176, as authority for its position. This is a privilege tax case arising under a similar statute of Tennessee. The syl-
labus is,

“The interstate character of the business prevents the State from imposing a privilege tax upon the business of soliciting by mail orders for intoxicating liquors from persons in other states, and the delivery for interstate shipment to a car-

rier within the state in fulfillment of such orders of intoxicating liquors from an existing stock on hand in the state."

In that case the only business done was the receipt of mail orders from other states and the acceptance of the same by the delivery of the liquor to the carriers consigned to purchasers in other states. The orders when received did not become contracts until accepted by the delivery of liquor to the carriers. It was this delivery to the carrier that consummated the sale and created the business sought to be taxed. The execution of the contract necessarily involved transportation of the liquor in interstate commerce. The carrier was but the means of effecting delivery of the goods. It was insisted for the State that the carrier was the agent of the purchaser, and for that reason the sale became complete upon delivery to the carrier, and, consequently, the transaction was local. That insistence was rejected, the Court saying:

"But this is immaterial since it is not open to controversy that substance and not form controls in determining whether a particular transaction is one of interstate commerce, and hence that the mere method of delivery is a negligible circumstance if in substance and effect the transaction under the facts of a given case is interstate commerce."

In the instant case, the contract recites that it is between John D. Flanagan "Of Tracy City, Tennessee," and the Federal Coal Company "of Chattanooga, Tennessee." It provides for delivery to the purchaser "f. o. b. cars" in Tennessee.

- The principle that the contract must necessarily involve in its execution transportation across state lines in order to be a part of interstate commerce was aptly stated by Chief Justice Taft in *U. S. vs. Addyston Pipe & Steel Co.*, 85 Federal, 298, in this language:

“The goods are not within the control of Congress until they are in actual transit from one state to another. But the negotiations and making of sales, which necessarily involve in their execution the delivery of merchandise across state lines, are interstate commerce and so within the regulating power of Congress even before the transit of the goods in performance of the contract has begun.”

In *Ware vs. Mobile County*, 209 U. S. 406, 52 Law Ed. 859, this Court considered the power of a state to impose a license tax upon a cotton broker. After citing cases holding that a tax could not be imposed upon interstate dealing in goods, the Court said:

“In these cases goods in a foreign state are sold upon orders for the purpose of bringing them to the state which undertakes to tax them, and the transactions are held to be interstate commerce because the subject matter of the dealing is goods to be shipped in interstate commerce to be carried between states and delivered from vendor to vendee by means of interstate carriage.”

Distinguishing those cases from the one under consideration, the Court said:

“He did not contract to ship it from one state to the place of delivery in another state, and though it is stipulated that shipments were made from Alabama to the foreign state in some in-

stances that was not because of any contractual obligations so to do. In neither class of contracts for sale or purchase was there necessarily any movement of commodities in interstate traffic because of the contracts made by the brokers. * * * The delivery when one was made was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate Commerce." (Italics ours.)

The text writer of *Corpus Juris*, Vol. 12, page 21, states the rule thus:

"The power of Congress to regulate interstate or foreign commerce includes the power to legislate on the subject of private contracts which directly and substantially relate to such commerce, as for instance, contracts which directly involve transportation from one state to another. On the other hand, contracts which in no way involve transportation are not in and of themselves any part of interstate commerce; neither is a contract of an interstate character where interstate commerce may become only incidental to its execution, and is not a part of it as between the parties to the contract.

Applying this rule to the question of sales of merchandise, the same text writer, page 26, uses this language:

"Delivery to the purchaser of goods in another state is an inherent and essential part of the intercourse defined by the word 'commerce,' and it is a general rule that a sale is a transaction of interstate commerce subject to Federal regulation but free from state laws consisting of taxation,

foreign corporation or other regulatory measures, where transportation of the subject matter of the sale from one state to another is essential to delivery to the purchaser, and the consequent completion or performance of the contract of sale.

* * * * *

“A completed contract of sale between residents of a state is not a transaction of interstate commerce, nor is a contract between citizens of different states, when the contract is made and delivery accepted in the state where the property is situated, although the buyer intends to ship the property outside the state.”

Reference is made in adversary brief to the fact that the contract with the Federal Coal Company was made on August 19th, 1920, and that petitioner Flanagan had paid the tax and obtained a license to do business which did not expire until September 18th, 1920. However, adversary brief admits that the contract was performed by both parties until after September 18th, and that the right of action on the contract did not arise in favor of Flanagan until December when he was doing business without paying a tax or procuring the license required.

No reasons are given, or authorities cited, why the facts of his previous compliance with the law would save the right of action now sued on from the taint of illegality.

Adversary brief (p. 6) quotes the Tennessee statute making it a misdemeanor to exercise the privilege of a coal dealer without first paying the tax and procuring a license. Tennessee Supreme Court in this case has construed that statute to create a public policy in Ten-

nessee barring the right of action in favor of Flanagan which arose as an incident of his illegal business.

In *Stevenson vs. Ewing*, 87th Tennessee, 48, the Supreme Court of that state on this question had ruled,

“When the tax takes the form of a tax on privileges of following an employment, * * * * * the persons taxed will be compelled to pay the tax as a condition to the right to carry on the business at all. In such case the business carried on without a license will be illegal, and no recovery can be had upon contracts made in the course of it.”

In *Hart vs. Brewing Co.*, 122 Tennessee, 69, that Court ruled,

“The rule is the same when the purpose of the contract although lawful when made becomes unlawful by statutes enacted before the full performance of its term * * * *, therefore, if one agrees to do a thing which it is lawful for him to do, and it becomes unlawful by an Act of Legislature, the Act avoids the promise.”

A number of Tennessee cases in construing the same and similar statutes have ruled that as a matter of public policy the courts of Tennessee will deny relief to any person for the enforcement of a right of action arising out of an unlawful business. *Carey, Lombard Lumber Co. vs. Thomas*, 97 Tenn., 597; *Insurance Co. vs. Kennedy*, 96 Tenn., 712; *Singer Mfg. Co. vs. Draper*, 102 Tenn., 262; *Westerson vs. Nashville*, 106 Tenn., 410.

It is for the Court of last resort in Tennessee to construe its statutes and define its public policy. So long

as the public policy so defined does not violate the Federal Constitution, it will be recognized and followed in the Federal courts. In this Court, the question is not open for review.

On the whole case, I insist there is no error shown in the judgment of the State Court.

Respectfully submitted,

CHAS. C. MOORE,
Counsel for Federal Coal Company.

FLANAGAN v. FEDERAL COAL COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 75. Argued October 15, 1924.—Decided March 2, 1925.

1. A contract of sale between two coal dealers for delivery of coal by the one to the other in car load lots, f. o. b. cars at the mine where produced is a transaction in interstate commerce not subject to be invalidated by a license law of the State, if the buyer, though entitled to stop the coal when so delivered, in practice buys it for shipment to his customers in other States and procures such shipment by orders under which the seller takes bills of lading, in the buyer's name, from the railroad at the mine and consigns the coal to such customers. *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282. P. 225.

Reversed.

CERTIORARI to a judgment of the Supreme Court of Tennessee which affirmed a judgment against the petitioner in his action for breach of a contract to purchase coal.

Mr. James J. Lynch, with whom Mr. Claiburn H. Garner was on the brief, for petitioner, relied chiefly on the following cases: *Lemke v. Farmers Grain Company*, 259 U. S. 50; *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282; *Railroad Commission v. Texas, etc.* 229 U. S. 336; *Texas & N. O. R. R. Co. v. Sabine Tram Co.* 227 U. S. 111; *Board of Trade v. Olsen*, 261 U. S. 1; *Stafford v. Wallace*, 258 U. S. 495; *Swift & Co. v. United States*, 196 U. S. 375; *Eureka Pipe Line v. Hallanan*, 257 U. S. 265; *United States Fuel Gas Co. v. Hallanan*, 257 U. S. 277; *Pennsylvania v. West Virginia*, 262 U. S. 553; *Heyman v. Hays*, 236 U. S. 176.

Mr. Chas. C. Moore for respondent, cited and relied chiefly upon: *Nathan v. Louisiana*, 8 How. 73; *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 665; *Ware v. Mobile County*, 209 U. S. 406; *Transportation Co. v. Wheeling*, 99 U. S. 273; *Howe Machine Co. v. Gage*, 100 U. S. 679; *Woodruff v. Parham*, 8 Wall. 123; *Walling v. Michigan*, 116 U. S. 446; *Cornell v. Coyne*, 192 U. S. 418; *Heisler v. Thomas Colliery*, 260 U. S. 256; *Coe v. Errol*, 116 U. S. 517; as illustrating conditions under which property at rest is subject to local taxation, and as authority for the proposition that the coal which Flanagan was selling to the Federal Coal Company was subject to taxation in his hands up to the moment title passed out of him.

There is a wide difference between a sale by a single dealer in grain or live stock, and the organization of a grain exchange, or stock yards, controlling the movement in commerce of a large part of the grain, or live stock, grown in the country.

The principle that the contract must necessarily involve in its execution transportation across state lines in order to be a part of interstate commerce was aptly stated in *United States v. Addyston Pipe Co.*, 85 Fed. 298.

Undoubtedly the Federal Coal Company in buying this coal was engaged in interstate commerce. But, if the sale and delivery of the coal by Flanagan was for that reason interstate commerce, then its purchase by him must for the same reason be interstate commerce, because he could not sell and deliver it without first buying it. By the same reasoning the mine operator in selling to him, in mining the coal and employing miners for the purpose, was engaged in interstate commerce, because each was an essential prerequisite of the other.

The Tennessee Supreme Court in construing and applying this local revenue statute in this case has said that the tax is levied not upon the sale but upon the business of dealing, which embraces both buying and selling. The court ruled that Flanagan might sell coal produced by him without paying the tax. He became subject to the tax, not because he made this sale to the Federal Coal Company, but because he engaged in the business of buying and selling coal. While paying the tax, Flanagan had the right to sell and did sell coal to local users. The sale of a part of it to the Federal Coal Company which it shipped out of the State was only an incident of the local business being conducted. The tax is not levied upon the sale for foreign shipment. Even if petitioner Flanagan had engaged exclusively in selling to foreign customers, he would have been charged no higher tax than a competitor engaged exclusively in selling to local customers. There was no discrimination.

Mr. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit for breach of a contract to purchase coal. The only question here is whether the State Courts erred in holding that the plaintiff (Flanagan, the petitioner) could not recover for an undeniable breach because at the time when the defendant, the Federal Company, refused to accept the coal the plaintiff's license as a coal dealer had

expired. The plaintiff says that the transaction was interstate commerce and therefore not subject to such regulation by state laws.

The contract was made on August 19, 1920, and bound the plaintiff to deliver and defendant to accept approximately two hundred cars of Tracy City run of mine coal at nine dollars per ton f. o. b. cars mines, i. e., at Tracy City, Tennessee. Shipments to be approximately fifty cars per month. Time, September 1, 1920, to December 31, 1920. Payments to be made weekly for coal shipped in previous week. The Federal Coal Company bought to sell again. It did not receive the coal itself but gave orders to Flanagan who took bills of lading from the Railroad Company at Tracy City in the name of the Federal Coal Company and consigned the coal to that Company's customers in other States as directed. The Company usually did not sell in Tennessee. It broke off its contract because the price of coal went down and, as it said, its customers refused to keep to their bargains in their turn.

There was some discussion below to show that Flanagan also bought this coal as a dealer and so was subject to the law in respect of this transaction. But for the present purpose it is immaterial how he came by what he sold. For if he was engaged in interstate commerce he could not be impeded because he was a dealer any more than if he was selling from his own mine. It was understood between the parties that these dealings were steps in sending coal from the mines to purchasers in other States. Very likely the Federal Coal Company might have stopped the coal at Tracy City in Tennessee, but it had no thought of doing so and Flanagan understood the course of business in which he was expected to coöperate and did coöperate. Therefore in this matter the parties were engaged in interstate commerce and the state law even if valid as a tax could not invalidate their contract. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282,

Counsel for Parties.

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290. *Lemke v. Farmers Grain Co.*, 258 U. S. 50. *A. G. Spalding & Bros. v. Edwards*, 262 U. S. 66, 69, 70. We see no sufficient reason for believing that the decision would have been the same if the State Court had regarded the transactions as interstate commerce and therefore its decision must be reversed.

Judgment reversed.
